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Fourth report on the immunity of State officials from foreign criminal jurisdiction

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I. Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session (2006) on the basis of a proposal contained in annex A to the report of the Commission on the work of that session.[1] At its fifty-ninth session (2007), the Commission decided to include this topic in its programme of work and appointed Román Anatolyevich Kolodkin as Special Rapporteur.[2] At the same session, the Secretariat was requested to prepare a background study on the topic.[3]

2. Special Rapporteur Kolodkin submitted three reports, in which he established the boundaries within which the topic should be considered and analysed various aspects of the substantive and procedural questions relating to the immunity of State officials from foreign criminal jurisdiction.[4] The Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, particularly in 2008 and 2011.

3. At its 3132nd meeting, held on 22 May 2012, the Commission appointed Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[5]

4. At the same session, the Special Rapporteur submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/654). The preliminary report was a "transitional report", in which the Special Rapporteur sought to help clarify the terms of the debate up to that point and to identify the principal points of contention which remained and on which the Commission might wish to continue to work in the future. The report also identified the topics which the Commission would have to consider, established the methodological bases for the study, and set out a workplan for the consideration of the topic.

5. The Commission examined the preliminary report at its sixty-fourth session, held in 2012, and approved the methodological bases and workplan proposed by the Special Rapporteur.[6] The Sixth Committee, as part of its consideration of the report of the International Law Commission during the sixty-seventh session of the General Assembly, examined the preliminary report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction and welcomed the proposals contained therein.[7]

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[1] See A/61/10, para. 257 and annex A.

[2] See A/62/10, para. 376.

[3] See A/62/10, para. 386. For the Secretariat study, see A/CN.4/596 and Corr. 1.

[4] For Special Rapporteur Kolodkin's reports, see A/CN.4/601, A/CN.4/631 and A/CN.4/646.

[5] See A/67/10, para. 84.

[6] For a summary of that debate, see A/67/10, paras. 86-189. See also the provisional summary records of the work of the Commission contained in documents A/CN.4/SR.3143, A/CN.4/SR.3144, A/CN.4/SR.3145, A/CN.4/SR.3146 and A/CN.4/SR.3147, all of which are available on the website of the Commission.

[7] The Sixth Committee considered the topic of immunity of State officials from foreign criminal jurisdiction at its 20th to 23rd meetings during that session. In addition, two States referred to the topic at the 19th meeting. The statements made by States at those meetings are reflected in summary records A/C.6/67/SR.19 to SR.23. See also A/CN.4/657, section C, paras. 26-38.

6. At the Commission's sixty-fifth session, the Special Rapporteur submitted a second report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661), which examined the scope of the topic and of the draft articles, the concepts of immunity and jurisdiction, the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the normative elements of immunity *ratione personae*. The report contained six proposed draft articles, dealing with the scope of the draft articles (draft articles 1 and 2), definitions (draft article 3), and the normative elements of immunity *ratione personae* (draft articles 4, 5 and 6), respectively.

7. The International Law Commission considered the second report of the Special Rapporteur at its 3164th to 3168th and 3170th meetings[8] and decided to refer the six draft articles to the Drafting Committee. On the basis of the report of the Drafting Committee,[9] the Commission provisionally adopted three draft articles, dealing with the scope of the draft articles (draft article 1) and the normative elements of immunity *ratione personae* (draft articles 3 and 4), respectively. The draft articles contain the essential elements of five of the reworked draft articles proposed by the Special Rapporteur. The Commission also approved the commentaries to the three draft articles which it had provisionally adopted. The Drafting Committee decided to keep the draft article on definitions under review and to take action on it at a later stage.[10]

8. The Sixth Committee examined the second report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction as part of its consideration of the annual report of the Commission during the sixty-eighth session of the General Assembly. States generally welcomed the report and the progress made in the Commission's work, and commended the Commission for submitting three draft articles to the General Assembly.[11]

9. In its annual report, the Commission requested States to "provide information, by 31 January 2014, on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases 'official acts' and 'acts performed in an official capacity' in the context of the immunity of State officials from foreign criminal jurisdiction".[12] Ten States submitted written comments in response to that request: Belgium, the Czech Republic, Germany, Ireland, Mexico, Norway, the Russian Federation, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

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[8] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see A/CN.4/SR.3164 to A/CN.4/SR.3168 and A/CN.4/SR.3170, all of which are available on the Commission's website.

[9] See A/CN.4/SR.3174.

[10] For the treatment of the topic by the International Law Commission at its sixty-fifth session, see A/68/10, paras. 40-49. See in particular the draft articles with the commentaries thereto contained in para. 49 of the report of the Commission. For the Commission's discussions on the commentaries to the draft articles, see A/CN.4/SR.3193 to A/CN.4/SR.3196.

[11] See A/C.6/68/SR.17 to SR.19. The full texts of statements by delegates who participated in the debate can be found at http://papersmart.unmeetings.org/en/ga/sixth/68th-session/agenda. See also A/CN.4/666, which contains the topical summary of the debate held in the Sixth Committee of the General Assembly at its sixty-eighth session, prepared by the Secretariat, in particular section B.

[12] A/68/10, para. 25.

10. At the sixty-sixth session of the Commission, the Special Rapporteur submitted a third report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/673), in which she commenced with an analysis of the normative elements of immunity *ratione materiae*, focusing on those aspects related to the subjective element. The report examined in detail the general concept of a "State official" and listed the criteria to be taken into consideration in identifying persons for inclusion in this category. It also analysed the subjective scope of immunity *ratione materiae*, determining those persons who can benefit from such immunity. Lastly, the report examined which would be the most suitable term for referring to persons who benefit from immunity, in view of the terminological issues posed by the use of the term "State official" and its equivalents in other language versions, with the Special Rapporteur proposing the use of the more general term "organ of the State". The report included two draft articles on the general concept of a "State official" for the purposes of the draft articles and the subjective scope of immunity *ratione materiae*, respectively, based on an analysis of judicial practice (national and international), relevant treaties, and the previous work of the Commission relating to the topic.

11. The Commission considered the third report of the Special Rapporteur at its 3217th to 3222nd meetings[13] and decided to refer the two draft articles to the Drafting Committee. On the basis of the report of the Drafting Committee,[14] the Commission provisionally adopted the draft articles on the general concept of a "State official" (draft article 2 (e)) and on "Persons enjoying immunity *ratione materiae*" (draft article 5). The Commission also adopted the commentaries to those two draft articles.[15]

12. The Sixth Committee examined the topic of immunity of State officials from foreign criminal jurisdiction as part of its consideration of the annual report of the International Law Commission during the sixty-ninth session of the General Assembly. States welcomed the third report of the Special Rapporteur and the two new draft articles provisionally adopted by the Commission. The majority of delegations were in favour of including a general definition of "State official" in the draft articles and expressed support for the definition proposed by the Commission, emphasizing the need to establish the existence of a link between the State and its officials. With regard to that definition, some States requested the Commission to clarify the scope of the phrase "who represents the State or who exercises State functions". The majority of States were in favour of taking the concept of "State official" into consideration in relation to immunity *ratione materiae*, since immunity from foreign criminal jurisdiction applies in respect of an individual (the "State official"), while they also emphasized the importance of the link between the State and the official. Furthermore, they supported the manner in which the Commission had addressed the topic and the wording of draft article 5. While some

[13] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see A/CN.4/SR.3217 to A/CN.4/SR.3222, all of which are available on the Commission's website.

[14] See A/CN.4/L.850 and A/CN.4/SR.3231. The statement of the Chairman of the Drafting Committee is available on the website of the Commission.

[15] For the treatment of the topic by the International Law Commission at its sixty-sixth session, see A/69/10, paras. 123-132. See in particular the draft articles with the commentaries thereto contained in para. 132 of the report of the Commission. For the Committee's discussions on the commentaries to the draft articles, see A/CN.4/SR.3240 to A/CN.4/SR.3242.

States said that the expression "acting as such" should be clarified, most welcomed it on the grounds that it clearly reinforced the functional nature of immunity. However, a small number of States expressed doubts about the advisability of taking the concept of "State official" into consideration in relation to immunity *ratione materiae*, being of the view that the definition of that category of immunity should be based solely on the nature of the acts performed and not the individual who performed them. It was generally held that future reports should address the concept of "acts performed in an official capacity" and the temporal aspect of immunity. States highlighted the significant progress made on the topic.[16]

13. In its report on the work of its sixty-sixth session, the Commission requested States to "provide information, by 31 January 2015, on their domestic law and their practice, in particular judicial practice, with reference to the following issues: (a) the meaning given to the phrases 'official acts' and 'acts performed in an official capacity' in the context of the immunity of State officials from foreign criminal jurisdiction; and (b) any exceptions to immunity of State officials from foreign criminal jurisdiction".[17] At the time the present report was finalized, written replies had been received from the following States: Austria, Cuba, the Czech Republic, Finland, France, Germany, Peru, Spain, Switzerland and the United Kingdom. In addition, several States referred in their statements in the Sixth Committee to the issues raised in the Commission's request. The Special Rapporteur wishes to thank those States for their comments, which are invaluable to the work of the Commission. She would also welcome any other comments that States may wish to submit at a later date. The comments received, as well as those submitted by States in 2014[18] and the observations contained in the oral statements made by delegates in the Sixth Committee of the General Assembly, have been duly taken into account in the preparation of the present report.

14. Following the workplan announced at the previous session, the fourth report continues with the analysis of the normative elements of immunity *ratione materiae*, addressing the substantive and temporal aspects. As a result of this analysis, two draft articles are proposed and can be found in the relevant part of the present report. Moreover, in order to facilitate the work of the Commission, an annex has been added to the report, containing the proposed draft articles. Lastly, the Special Rapporteur wishes to point out that the present report should be read in conjunction with those submitted previously, with which it forms a whole, as well as with the draft articles provisionally adopted to date by the Commission and the commentaries thereto.

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[16] See A/C.6/69/SR.21 to SR.26. The full texts of statements by delegates who participated in the debate can be found at http://papersmart.unmeetings.org/es/ga/sixth/69th-session/agenda. See also A/CN.4/678, which contains the topical summary of the debate held in the Sixth Committee of the General Assembly at its sixty-ninth session, prepared by the Secretariat, section D, paras. 37-51.

[17] A/69/10, para. 28.

[18] See *supra*, para. 9.

II. Immunity *ratione materiae*: normative elements (continued)

A. General considerations

15. As noted in the previous reports of the Special Rapporteur, "the distinction between immunity *ratione personae* and immunity *ratione materiae* is one of the few matters on which there has been broad consensus during the Commission's discussions on this topic".[19] Moreover, the distinction between these two types of immunity of State officials from foreign criminal jurisdiction was previously considered by the Commission, as reflected in both the memorandum by the Secretariat[20] and in the preliminary report of Special Rapporteur Kolodkin,[21] although in both cases the analysis was from a purely descriptive and conceptual standpoint.

16. With regard to the work of the Commission during the present quinquennium, it should be recalled that the Commission has been addressing the distinction between immunity *ratione personae* and immunity *ratione materiae* from a normative perspective since 2013, with a view to establishing a separate legal regime for each category. This does not mean, however, that the two categories of immunity do not have elements in common, especially in respect of the functional dimension of immunity in a broad sense.[22] This normative approach was reflected in the draft articles provisionally adopted by the Commission, in the commentaries thereto, and in the very structure of the draft articles as provisionally adopted thus far.[23]

17. In accordance with previous reports, the basic characteristics of immunity *ratione materiae* can be identified as follows:

(a) It is granted to all State officials;

(b) It is granted only in respect of acts that can be characterized as "acts performed in an official capacity"; and

(c) It is not time-limited since immunity *ratione materiae* continues even after the person who enjoys such immunity is no longer an official.[24]

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[19] See A/CN.4/661, para. 47, *in fine*, and A/CN.4/673, para. 10.

[20] See A/CN.4/596, para. 88 ff.

[21] See A/CN.4/601, paras. 78-83.

[22] See A/CN.4/661, paras. 53 and 48, and A/CN.4/673, para. 10, *in fine*.

[23] It should be noted that the draft articles are divided into separate parts covering immunity *ratione personae* (Part Two) and immunity *ratione materiae* (Part Three) (see *Report of the International Law Commission on the work of its sixty-sixth session*, A/69/10, para. 131). Furthermore, draft article 4, para. 3, as provisionally adopted by the Commission in 2013, is framed on the basis of that distinction, providing that "the cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*" (see the Commission's commentary to draft article 4, particularly para. (7), *Report of the International Law Commission on the work of its sixty-fifth session*, A/68/10, para. 49). In connection with this matter, see the third report of the Special Rapporteur, A/CN.4/673, para. 11.

[24] See A/CN.4/661, para. 50, and A/CN.4/673, paras. 12 and 13. These three elements correspond to the different definitions of immunity *ratione materiae* found in legal literature and case law, as well as in the previous work of the Commission. See A/CN.4/673, in particular footnotes 21 and 22, corresponding to para. 13 of that report.

18. The normative elements that make up this type of immunity must be deduced from these three characteristics, namely:

(a) The subjective scope of immunity *ratione materiae*: what persons benefit from immunity?

(b) The material scope of immunity *ratione materiae*: what types of acts performed by these persons are covered by immunity?

(c) The temporal scope of immunity *ratione materiae*: over what period of time can immunity be invoked and applied?[25]

19. Although the three aforementioned normative elements should be analysed together as a whole, their diversity and complexity means that they are addressed separately in the reports of the Special Rapporteur. The first element (the subjective scope) has already been discussed in the third report,[26] and this fourth report will analyse, in turn, the material scope (concept of an "act performed in an official capacity") and the temporal scope of immunity *ratione materiae*.

20. Lastly, it should be recalled that, as indicated in previous reports,[27] characterizing these three aspects as "the normative elements of immunity *ratione materiae*" does not mean that they are the only elements to be considered in defining the legal regime applicable to this type of immunity. In particular, the Special Rapporteur wishes to emphasize that such characterization should not be read as a pronouncement on exceptions to immunity or as recognition that it is absolute or limitless in nature.

B. The concept of an "act performed in an official capacity"

1. General considerations

21. As stated in the third report, an individual may enjoy immunity from jurisdiction *ratione materiae* if, in a given case, three conditions are met: (a) the individual may be considered a State official, (b) as such, the individual performed an act in an official capacity and (c) the act was carried out during the individual's term of office. On the other hand, a situation may arise where, although an individual is a State official in the sense of the present draft articles and performs an act during his or her term of office, the act performed cannot be deemed to be an "act performed in an official capacity", in which case, the possibility of immunity from foreign criminal jurisdiction cannot be entertained.

22. In view of the above, it is clear that great importance must be attached to the "act performed in an official capacity" in the context of immunity *ratione materiae*, as has been emphasized by all members of the Commission and by States. Some have raised it to the level of exclusivity, taking the view that the only relevant consideration in determining the applicability of immunity *ratione materiae* is whether the act concerned is an "act performed in an official capacity", irrespective of who carried out the act. The fact that the International Law Commission has not

[25] The same methodology is used for both immunity *ratione materiae* and immunity *ratione personae*, since the three elements identified as normative elements are present in both categories. See A/CN.4/661, para. 55, and A/CN.4/673, para. 13.

[26] See A/CN.4/673, in particular, paras. 28-11 and 145-151.

[27] See A/CN.4/661, paras. 55 and 73, and A/CN.4/673, para. 15.

taken that approach[28] does not diminish the important role of the official's conduct (the "act performed in an official capacity") in the general structure of immunity *ratione materiae*. That role stems from the eminently functional nature of this type of immunity, in which the presence of the State manifests itself through two distinct but complementary connections: the connection that links the official to the State and the connection that links the State to certain acts that represent expressions of sovereignty and the exercise of functions of governmental authority.

23. Consequently, the two elements (subjective and material) are inextricably linked but constitute separate conceptual categories that must be analysed and dealt with independently of one another. The independent nature of the two elements, which was the subject of discussion at the last session of the Commission and which has also been raised in the Sixth Committee, was mentioned in the third report submitted by the Special Rapporteur, which states the following:

> 145. ... determining the persons to whom immunity *ratione materiae* applies is one of the normative elements of this type of immunity from criminal jurisdiction. The first criterion for identifying these persons is the existence of a connection with the State, which justifies the recognition of their immunity from criminal jurisdiction in the interests of the State, in order to protect the sovereign prerogatives of the State. This connection with the State is therefore a central element in defining the concept of an "official".
>
> 146. This connection is related to the concept of "an act performed in an official capacity", which constitutes the second normative element of immunity *ratione materiae*, but which cannot be identified or confused with same. On the contrary, for the purposes of defining the subjective scope of this type of immunity, reference to the connection with the State must be confined to the observation that the individual may act in the name and on behalf of the State, performing functions that involve the exercise of governmental authority. Accordingly, to define the concept of an "official" for the purposes of immunity *ratione materiae*, the specific content of the act performed by the individual should not be taken into consideration; said content is related to the concept and limits of "acts performed in an official capacity" and, therefore, will be analysed in the next report. In short, the existence of a connection between the beneficiary of immunity *ratione materiae* and the State should be taken to mean that the person in question is in a position to perform acts that involve the exercise of governmental authority. Whether a specific act performed by an official benefits from that immunity or not would depend on ... whether the act in question can be deemed an "act performed in an official capacity", and whether said act was performed by the person at a time when he or she was an official of the State.[29]

24. The relationship between the concepts of "State official" and "act performed in an official capacity" was the subject of an interesting debate in the Commission at its sixty-sixth session. Some members of the Commission understood the definition of "official" proposed in draft article 2 (e), in particular its subparagraph (ii), to cover both the subjective and material elements of immunity *ratione materiae* from foreign criminal jurisdiction. While that issue could, in the opinion of the Special

[28] See para. (3) of the commentary to draft article 5, *Report of the International Law Commission on the work of its sixty-sixth session*, A/69/10, para. 132.

[29] See A/CN.4/673. Footnotes have been omitted from the quotation. See also paras. 12 and 13.

Rapporteur, have been settled by the wording of the paragraphs from the third report cited above, the Commission chose to avoid any possible confusion between the concepts of "official" and "act" by removing the reference to "acts" from article 2 (e) and replacing it with a reference to an "individual who represents the State or who exercises State functions". These neutral terms define the link between the official and the State without making an implicit judgment as to the type of acts covered by immunity.[30] In any case, as explicitly stated in the third report, the delimitation of such acts remained to be determined in a future study.[31] The present report fulfils that task.

25. Defining the concept and characteristics of an "act performed in an official capacity" is a matter of considerable importance for the topic of immunity of State officials from foreign criminal jurisdiction understood as a whole. However, it only has actual effects with regard to immunity *ratione materiae*, given that in the case of immunity *ratione personae* all acts performed by Heads of State, Heads of Government and Ministers for Foreign Affairs are covered by immunity, regardless of whether those acts are carried out in a private or in an official capacity. The concept of an "act performed in an official capacity" is thus a characteristic and essential element of immunity *ratione materiae* and its analysis is of crucial importance for the topic.

26. Based on these premises, the following issues will be analysed: use of the expression "act performed in an official capacity" versus "act performed in a private capacity", criteria for identifying an "act performed in an official capacity"; and the relationship between an "act performed in an official capacity", responsibility and immunity. The purpose of this analysis is to identify the characteristics of an "act performed in an official capacity" that can be used to formulate a proposed definition of the term.

2. "Act performed in an official capacity" versus "act performed in a private capacity"

27. At its sixty-fifth session, when it provisionally adopted draft article 4, paragraph 2, the Commission decided to use the expression "acts performed in an official capacity" in opposition to "acts performed in a private capacity" by a Head of State, Head of Government or a Minister for Foreign Affairs, thus following the usage of the International Court of Justice in the *Arrest Warrant case*.[32] Since then, the Commission has continued to use the expression "acts performed in an official capacity" to refer to acts covered, in principle, by immunity *ratione materiae*. The same terminology will be used in this report.

28. However, an analysis of practice, as well as of the specialized legal literature, reveals that many terms are used to refer to acts performed by an official that could give rise to immunity *ratione materiae*, for example, "official act", "act in representation of the State", "act in the name of the State", "public act", "governmental act" or even "act of State". These terms tend to be used interchangeably and could thus be considered synonymous, although it should be

[30] See paras. (9), (10) and (11) of the commentary to draft article 2 (e), *Report of the International Law Commission on the work of its sixty-sixth session*, A/69/10, para. 132.

[31] A/CN.4/673, para. 152.

[32] See commentary to draft article 4, in particular paras. (3) and (4), *Report of the International Law Commission on the work of its sixty-fifth session*, A/68/10, para. 49.

noted they are not all consistently used with an identical meaning. However, a detailed analysis of the various aforementioned terms is not required for the purposes of the present report, as it would be of very little relevance to the topic at hand. Moreover, the expression "act performed in an official capacity" seems to be the most commonly used term, particularly in the legal literature.

29. That said, it should be noted that the use of some of these terms in certain contexts must be analysed with extreme caution, as they may be used to refer to a phenomenon other than the one under consideration here. That is especially true of the expression "act of State", which is used in some common-law countries, particularly the United States and the United Kingdom, in the context of the "act of State doctrine". As is frequently pointed out in the literature, that doctrine, which is not recognized in other legal systems, does not fully coincide with the institution of jurisdictional immunity and is not based on customary international law. However, the fact that its practical effects are at times similar to those of jurisdictional immunity has led to a certain amount of confusion between the two concepts.[33]

30. It is also important to bear in mind that the distinction between "act performed in an official capacity" and "act performed in a private capacity" is not equivalent to, and should not be confused with, the distinction between *acta jure imperii* and *acta jure gestionis*, which are characteristics of State immunity. The term "act performed in an official capacity" is broader in scope than "*acta jure imperii*", as the former may cover certain *acta jure gestionis* performed by State officials in the discharge of their mandate and in exercise of State functions.

31. Furthermore, it should be noted that the distinction between "act performed in an official capacity" and "act performed in a private capacity" has no relation whatsoever to the distinction between lawful and unlawful acts. On the contrary, when used in the context of immunity of State officials from foreign criminal jurisdiction, the first two categories of acts are both considered, by definition, to be criminally unlawful. If they were not, there would be no cause for the exercise of the criminal jurisdiction of the forum State from which immunity is claimed.

32. In any case, it should be stressed that the expression "act performed in an official capacity" derives its meaning from being in opposition to "act performed in a private capacity". However, beyond this negative or exclusionary meaning, the expression "act performed in an official capacity" is somewhat ambiguous. Contemporary international law does not provide a definition of this type of act, and national law is irrelevant for the purposes of this discussion, given the significant differences that may exist between the legislation of different States. Moreover, domestic legislation should not be a determining factor in defining the scope and meaning of the expression "act performed in an official capacity" for the purposes of draft articles aimed at identifying the international legal framework applicable to the immunity of State officials from foreign criminal jurisdiction; it should serve simply as a complementary interpretive tool.

33. In short, while considering "acts performed in an official capacity" in opposition to "acts performed in a private capacity" may be helpful for gaining an understanding in abstract terms of whether a certain act is covered by immunity

[33] Hazel Fox and Philippa Webb, *The Law of State Immunity, 3rd edition*, Oxford University Press, 2013, p. 53-72. Rubén Carnerero Castilla, *La inmunidad de jurisdicción penal de los Jefes de Estado extranjeros*, Iustel, 2007, pp. 36-44.

ratione materiae, use of the two expressions as mutually exclusive terms is not useful for determining the scope and content of the material element of this type of immunity. To achieve that objective, it will be necessary to determine the identifying features of acts performed in an official capacity.

3. Criteria for identifying an "act performed in an official capacity"

34. In light of the above, it is clearly important to determine the criteria for identifying an "act performed in an official capacity". In order to do so, it will be necessary to undertake an analysis of practice, following the approach and structure adopted for the analysis of the concept of a "State official" in the third report.[34] That will involve the successive analysis of judicial practice (international and national), treaty practice and previous work of the International Law Commission that is particularly relevant to the topic.

(i) International judicial practice

35. The International Court of Justice, the European Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia have issued judgements which refer, in one way or another, to the concept of "acts performed in an official capacity" in the context of immunity.

36. It should be recalled that the International Court of Justice has referred to the immunity of State officials in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and *Certain Questions of Mutual Assistance in Criminal Matters*, pronouncing in both cases on the nature of various acts performed by senior State officials. Furthermore, the case *Jurisdictional Immunities of the State*, while referring only to the immunity of the State, also takes into consideration the concept of acts performed in an official capacity. Lastly, the case concerning *Questions relating to the Obligation to Prosecute or Extradite* originated in alleged acts performed in an official capacity, although the Court did not ultimately have to pronounce on those acts.

37. In the first of the aforementioned cases, the facts giving rise to the application relate to the commission by the Minister for Foreign Affairs of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, of a series of acts that constituted grave breaches of the Geneva Conventions and the Additional Protocols thereto as well as crimes against humanity. In its judgment, the Court states that Ministers for Foreign Affairs enjoy immunity from criminal jurisdiction and affirms that "the immunities ... are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States".[35]

Those functions are analysed in detail by the Court, which describes them as follows:

> He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs,

[34] See A/CN.4/673, paras. 29-110.

[35] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, paras. 51 and 53.

> simply by virtue of that office, has full powers to act on behalf of the State (see, for example, Article 7, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties) ... It is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.[36]

38. As can be seen, such activities derive from the exercise of elements of the governmental authority at the highest level; consequently, they are examples that must be taken into consideration in determining the criteria for identifying what constitutes an act performed in an official capacity. It should, however, be recalled that, in their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal, questioned whether

> "serious international crimes [can] be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform".

They added that there is an

> "increasing realization that State-related motives are not the proper test for determining what constitutes public State acts".[37]

39. The second of the cases brought before the International Court of Justice originated in various judicial proceedings opened in France as a result of the death in unexplained circumstances of Mr. Bernard Borrel, a French judge who had been seconded to the Ministry of Justice of Djibouti. In the context of those proceedings, investigations were opened which, based on statements by two Djibouti officials, provided circumstantial evidence that Mr. Ismaël Omar Guelleh, President of the Republic at the time the investigations were opened, was implicated in Mr. Borrel's death. On that basis, a witness summons was issued requesting his testimony in the case. Two other senior officials of Djibouti, Mr. Djama Souleiman Ali (*procureur de la République*) and Mr. Hassan Said Khaireh (Head of National Security) were called to testify as *témoins assistés* (legally assisted witnesses) and the French courts issued a European arrest warrant against them; they were both eventually accused and found guilty of threatening witnesses. The two aforementioned cases are of particular interest for the purposes of this report. The Court did not rule on whether those two senior officials benefited from immunity *ratione materiae*; however, in analysing such a possibility it made statements that are of relevance for defining the concept of an "act performed in an official capacity". In particular, it expressly referred to the requirement that, in order to be characterized as acts performed in an official capacity, it was necessary that the acts imputed to them

> "were indeed acts within the scope of [the] duties [of those officials] as organs of State".[38]

Furthermore, by stating that Djibouti never informed France that "the acts complained of (...) were its own acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in

[36] Ibid., para. 53.

[37] Ibid., *Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal*, para. 85.

[38] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, para. 191.

carrying them out",[39] the Court implicitly referred to the attribution of the act to the State as a requirement for determining the possibility of immunity.

40. In *Jurisdictional Immunities of the State*, the case is based on acts of murder, confinement and denial of prisoner-of-war status committed by the armed forces and other organs of the German Third Reich during the Second World War, in both Italy and Greece, against persons who held Italian or Greek nationality. Although the Court does not rule on the immunity of German officials but rather on the immunity of Germany, it refers to the said acts in the judgment, concluding that they must be regarded as *acta jure imperii*, which entail the exercise of sovereign power, and that they are therefore covered by the immunity from jurisdiction of the State.[40] To reach that conclusion, it carried out an analysis of the distinction between *acta jure imperii* and *acta jure gestionis*, which, although not relevant for our purposes, nonetheless contains arguments that can be used to identify some characteristics of acts performed in an official capacity. For example, it states as follows:

> "The Court considers that the terms *"jure imperii"* and *"jure gestionis"* do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*)".[41]

41. The aforementioned acts were also characterized as "sovereign acts" by Judge Koroma[42] and Judge ad hoc Gaja.[43] On the other hand, Judge Cançado Trindade concluded in his dissenting opinion that sovereignty cannot be invoked in reference to conduct constituting international crimes, stating that "international crimes are not acts of State, nor are they "private acts" either; a crime is a crime, irrespective of who committed it".[44]

42. Lastly, the *Belgium v. Senegal* case originated in the acts of extermination, torture, persecution and enforced disappearances allegedly committed by Mr. Hissène Habré during his term as President of Chad. However, the Court did not rule on the nature of those acts and the possibility that they might be covered by immunity; it merely retained the arguments put forward by the parties in the domestic proceedings followed in Belgium and Senegal.[45]

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[39] Ibid., para. 196.

[40] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, paras. 60 and 61.

[41] Ibid., para. 60.

[42] Ibid., *Separate opinion of Judge Koroma*, para. 4: "a decision to deploy a nation's armed forces in an armed conflict is quintessentially a sovereign act."

[43] Ibid., *Dissenting opinion of Judge ad hoc Gaja*, p. 313. Judge Gaja states that, in order for an activity to be described as *jure imperii*, it must "[occur] in the exercise of a sovereign power by [the] State". It should also be borne in mind that Judge ad hoc Gaja introduces an interesting nuance by stating that the distinction between *acta jure imperii* and *acta jure gestionis* assumes no relevance in respect of claims relating to intentional bodily harm or similar (p. 313); he concludes that "(...) even if immunity covered in general claims regarding damages caused by military activities in the territory of the forum State, it would not extend to claims relating to massacres of civilians or torture in the same territory" (p. 319).

[44] Ibid., *Dissenting opinion of Judge Cançado Trindade*, para. 181. See, in general, para. 178 ff.

[45] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, paras. 20 and 22.

43. With reference to the contribution of the European Court of Human Rights to the topic under consideration in this report, it should first of all be noted that judgements of the European Court do not, as a general rule, refer to the immunity of State officials from foreign criminal jurisdiction but to the State's immunity from civil jurisdiction;[46] the Court pronounces in all cases on the compatibility of such immunity from civil jurisdiction with the right to fair trial recognized in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950. It is, however, also true that in its judgements, the European Court has addressed specific acts performed by State officials, and for that reason the pronouncements of the said Court could be useful for determining the characteristics of "acts performed in an official capacity".

44. In *McElhinney v. Ireland*, the case brought before the European Court of Human Rights originated in events that took place as a result of the conduct of an Irish citizen when passing a checkpoint at the border between Northern Ireland and the Republic of Ireland, followed by the pursuit by a British soldier of the said citizen, by then on Irish territory, in the course of which, according to the applicant, he was subject to ill-treatment, attacks against his physical integrity and a failure by the British soldier to perform his duties correctly. Notwithstanding other interesting arguments contained in this judgement regarding immunity from foreign criminal jurisdiction, it is worth highlighting here that, in the opinion of the European Court, "the acts of a soldier on foreign territory" are closely related to "the core area of State sovereignty (...) which, of their very nature may" involve issues "affecting diplomatic relations between States and national security". As a result, it characterized the acts complained of before the Court as *acta jure imperii*, which are acts of the State and are covered by immunity.[47]

45. In the case of *Al-Adsani v. the United Kingdom*, the facts underpinning the application are the detention and torture that the applicant allegedly suffered at the hands of Sheikh Jaber Al-Sabah Al-Saud Al-Sabah and two other persons in a Kuwaiti State security prison and the palace of the Emir of Kuwait's brother to which the applicant had been transported in government vehicles. Although the Court did not rule on the possible immunity of the persons who committed the acts of torture because the British courts had already heard the case against the three persons in question, issuing judgement in absentia against the Sheikh and giving the applicant leave to take action against the other two persons,[48] it did implicitly evaluate the nature of the acts in question. In that regard, it concluded that such acts constituted torture, which is prohibited by *jus cogens*;[49] nonetheless it stated that it was not possible to identify in the international law applicable at that date any

[46] The European Court of Human Rights refers specifically to the distinction between civil and criminal proceedings in its judgement in the case of *Al-Adsani v. the United Kingdom* (application No. 35763/97), of 21 November 2001, paragraphs 34, 61 and 66. The distinction, however, was rejected by the judges who voted against the judgement (see the joint dissenting opinion of Judges Rozakis and Caflish, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić). This distinction was again highlighted by the Court in the case of *Jones and others v. the United Kingdom* (applications Nos. 34356/06 and 40528/06), of 14 January 2014, para. 207. The distinction was also criticized in the dissenting opinion of Judge Kalaydjieva. The Government of the United Kingdom, however, accepted the distinction (see para. 179 of the judgement).

[47] See case of *McElhinney v. Ireland* (application No. 31253/96), Grand Chamber, Judgment of 21 November 2001, in particular para. 38.

[48] See paras. 14 and 15 of the *Al-Adsani* judgement.

[49] Ibid., paras. 58 and 61.

exception that would deprive States of immunity from civil suit in relation to such acts.[50] While it is true that the Court did not expressly describe the acts of torture as acts of State or acts performed in an official capacity, it is also true that the aforementioned argument is equivalent to recognizing torture as an act attributable to the State, which, prima facie, may therefore be regarded as an act performed in an official capacity by the perpetrators.

46. In the case of *Jones and others v. the United Kingdom*, the European Court of Human Rights had to rule on immunity in relation to acts of torture committed by Saudi Arabian officials against the applicants during their detention in Saudi Arabia. As already mentioned in the third report, the judgement in this case is of great interest from various perspectives and should be subject to continued analysis in the Commission's work.[51] With regard to the concept of an "act performed in an official capacity" the following statements by the Court are noteworthy:

> "State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State"[52]

and

> "[I]ndividuals only benefit from State immunity *ratione materiae* where the impugned acts were carried out in the course of their official duties".[53]

Furthermore, the Court refers to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stating that:

> "[t]he Convention against Torture defines torture as an act inflicted by a 'public official or other person acting in an official capacity'. This definition appears to lend support to the argument that acts of torture can be committed in an 'official capacity' for the purposes of State immunity".[54]

As a result, it seems that these acts, at least prima facie, can be characterized as acts performed in an official capacity.

47. In analysing the case law of the European Court of Human Rights, it is useful to refer lastly to a recent judgement issued by that Court which, although it relates to immunities governed by domestic law, contains elements that could be of interest for the purposes of defining the characteristics of an act performed in an official capacity. The judgement in question is the one handed down in the case of *Urechean and Pavlicenco v. the Republic of Moldova*,[55] which refers to public statements made in 2004 and 2007 by the President of Moldova, accusing the applicants, respectively, of having created a mafia-style system of corruption and of having

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[50] Ibid., para. 66.

[51] It should be borne in mind that a particular feature of the case is that the judicial acts complained of before the European Court of Human Rights did not refer, at their origin, to the immunity of the State but to the immunity from jurisdiction of Saudi Arabian officials against whom proceedings had been brought individually. It should also be added that the British courts undertook lengthy proceedings, in the course of which their position concerning the question of the immunity from civil jurisdiction of the aforementioned officials for the alleged commission of acts of torture was subject to successive appeals and changes in substantive pronouncements.

[52] Ibid., para. 204.

[53] Ibid., para. 205.

[54] Ibid., para. 206.

[55] See case of *Urechean and Pavlicenco v. the Republic of Moldova* (applications Nos. 27756/05 and 41219/07), judgement of 2 December 2014.

been linked with the Committee of State Security (KGB). The defamation or libel actions brought by the individuals concerned before the Moldovan courts were struck out, as those courts considered that the aforementioned statements had been made by the President in the exercise of his official duties and were therefore covered by immunity. For their part, the applicants argued that the defamatory statements of the President had not been made in his capacity as President but outside it, in his capacity as leader of his party. Although the Court considered that, in abstract terms, statements by a Head of State could be covered by immunity and did not conclude whether the statements in the case in question were official or private acts, it did highlight the requirement for the domestic courts to establish whether the impugned statements were made in the exercise of official duties or not, particularly bearing in mind that the immunity accorded to the President of the Republic of Moldova for acts performed in exercise of his official duties are perpetual and do not end when he leaves office. From that perspective, the Court has begun an important debate on the need to establish whether an act is official or private, including with regard to acts that, ab initio, have a clear appearance of being official. That debate should also be taken into account for the purposes of the present report.

48. To conclude this section, attention should be drawn to the judgement of 29 October 1997 handed down by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case *Prosecutor v. Tihomir Blaskic*, which is frequently cited in connection with immunity *ratione materiae*.[56] That judgement originated in the request of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, by means of which a Croatian official was ordered to appear before the Tribunal and produce certain official documents for its use (subpoena). The Appeals Chamber concluded that the subpoenaed official had acted in exercise of an official function of the State, and that his acts were not attributable to him personally but to the State (acts performed in an official capacity);[57] thus, they did not fall within the category of acts performed by "individuals acting in their private capacity" (acts performed in a private capacity).[58]

(ii) National judicial practice

49. The practice of national courts is particularly significant for defining the concept of an "act performed in an official capacity", as national courts are the judicial bodies that must decide cases that may be affected by the immunity of State officials from foreign criminal jurisdiction. These courts thus rule on the acts which, from the perspective of immunity *ratione materiae*, may be covered by immunity. Such practice will be discussed in the following pages, employing the same methodology as in the third report, by examining the outcomes of both criminal proceedings and civil cases dealing with issues relevant to the identification of the essential characteristics of "acts performed in an official capacity". The goal of such analysis is twofold. First, the aim is to identify forms of conduct that, in practice, have been subject to claims of immunity and therefore could be regarded *prima facie* as "acts performed in an official capacity". Second, the analysis seeks to

[56] International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Tihomir Blaskic*, IT-95-14-AR 108, 29 October 1997.

[57] Ibid., para. 38.

[58] Ibid., para. 49.

identify elements common to such forms of conduct that could be regarded as criteria for identifying acts performed in an official capacity.

50. With respect to criminal proceedings, it is, first of all, worth noting that immunity has been invoked for only a few types of criminal conduct. In many cases, such conduct consists of crimes under international law, including torture, mass killings, genocide, extrajudicial executions, enforced disappearances, forced pregnancy, deportation, denial of prisoner-of-war status, enslavement and forced labour, and acts of terrorism.[59] Those crimes are sometimes mentioned *eo nomine*, while in other cases the proceedings refer generically to crimes against humanity, war crimes, and serious and systematic human rights violations.[60] Second, the courts have been seized of other acts committed by members of the armed forces or security services that do not fall into the aforementioned categories; such acts include ill-treatment, abuse, illegal detention, abduction, offences against the administration of justice and other acts relating to policing and law enforcement.[61] Lastly, claims of immunity have been made in relation to the diversion and illegal appropriation of public funds, money-laundering and other acts linked to corruption,

[59] *In re Rauter* case, the Netherlands, Special Court of Cassation, judgement of 12 January 1949, 16 *ILR* 553 (crimes committed by German occupation forces in Denmark). *Attorney General of Israel v. Adolf Eichmann* case, District Court of Jerusalem (case No. 40/61), judgement of 11 December 1961, and Appeals Tribunal, judgement of 29 May 1962; 36 *ILR* 18 and 277 (crimes committed during the Second World War, including war crimes, crimes against humanity and genocide). *Yasser Arafat (Carnevale re. Valente — Imp. Arafat e Salah)* case, Italy, Court of Cassation, judgement of 28 June 1985; *Rivista di diritto internazionale 69* (1986) (sale of weapons and collaboration with the Red Brigades on acts of terrorism). *R. v. Mafart and Prieur (Rainbow Warrior* case), New Zealand, High Court, Auckland Registry, November 1985 (acts carried out by members of the French armed forces and security forces to mine the ship *Rainbow Warrior*, which led to the sinking of the ship and the death of several people; these were described as terrorist acts). *Former Syrian Ambassador to the German Democratic Republic* case, Federal Supreme Court of Germany, Federal Constitutional Court of Germany, judgement of 10 June 1997 (the case examined legal action against a former ambassador who allegedly stored, in diplomatic premises, weapons that were later used to commit terrorist acts). *Bouterse* case, R 97/163/12 Sv and R 97/176/12 Sv, Court of Appeal of Amsterdam, 2000 (torture, crimes against humanity). *Gaddafi* case, Court of Appeal of Paris, judgement of 20 October 2000 and Court of Cassation, judgement of 13 March 2001; 125 *ILR* 490 and 508 (the ordering of the downing of a plane using explosives, which caused the death of 170 people, considered as terrorism). *Prosecutor v. Hissène Habré* case, Court of Appeal of Dakar (Senegal), judgement of 4 July 2000, and Court of Cassation, judgement of 20 March 2001; 125 *ILR* 571 and 577 (acts of torture and crimes against humanity). *Sharon and Yaron* case, Court of Appeal of Brussels, judgement of 26 June 2002; 127 *ILR* 110 (war crimes, crimes against humanity and genocide). *A. v. Office of the Public Prosecutor of the Confederation* (Nezzar case), Federal Criminal Court of Switzerland (case No. BB.2011.140), judgement of 25 July 2012 (torture and other crimes against humanity).

[60] *In re Doe* case, United States, 860 F. 2d 40 (Second Circuit, 1988) (human rights violations committed against Falun Gong members).

[61] *Border Guards* case, Federal Criminal Court of Germany, decision of 3 November 1992 (case No. 5 StR 370/92); 100 *ILR* 364 (death of a young German, as a result of shots fired by border guards of the German Democratic Republic, when he attempted to traverse the so-called Berlin Wall). *Norburt Schmidt v. Home Secretary of the Government of the United Kingdom* case, Supreme Court (Ireland), judgement of 24 April 1997 (irregular circumstances during the detention of the plaintiff by State officials). *Khurts Bat v. Federal Court of Germany* case, United Kingdom [2011] EWHC 2029 (Admin) (kidnapping and illegal detention).

as well as drug trafficking.[62] With regard to civil proceedings, it should be noted that, in most cases, immunity has been invoked in connection with claims for damages in respect of some of the aforementioned offences,[63] although in some cases the claim of immunity from civil jurisdiction has also been extended to conduct that is not criminal in nature, such as the non-payment of debts, the non-fulfilment of personal obligations and personal injuries resulting from

[62] *United States v. Noriega*, United States Court of Appeals, Eleventh Circuit, judgement of 7 July 1997 (international drug trafficking to the United States when Noriega was Commander of the Armed Forces of Panama). Court of Appeal of Paris, judgements of 13 June 2013 and 16 April 2015.

[63] *Republic of the Philippines v. Marcos and others*. United States Court of Appeals, Second Circuit, judgement of 26 November 1986 (use of power to appropriate large sums of money belonging to the Government and the people of the Philippines). *Saltany v. Reagan and others*, District Court for the District of Columbia, United States, judgement of 23 December 1988 (bombing by the United States air force of targets in Libya which caused death, personal injuries and damage to property; the British authorities allowed the use of bases in its territory for the bombing, for which they were also prosecuted). *Herbage v. Meese*, United States, 747 F. Supp. 60 (DDD 1990); 98 *ILR* 101 (extradition of a British citizen to the United States; the plaintiff claimed that illegal acts had been committed by the State officials that carried out the extradition). *Hilao, et al v. Marcos*, United States Court of Appeals, Ninth Circuit, judgement of 16 June 1994 (torture, summary executions and disappearances committed by intelligence agents in fulfilment of martial law declared by President Marcos in 1971). *Lafontant v. Aristide*, United States District Court, Eastern District of New York, judgement of 27 January 1994 (charge of extrajudicial killing of a Haitian national by security forces acting under orders from President Aristide). *McElhinney v. Williams*, Ireland, 1995, 104 *ILR* 691 (persecution, detention and ill-treatment, by a British soldier, of an Irish citizen while he was crossing the border between Northern Ireland and the Republic of Ireland). *Kadic v. Karadžić*, United States Court of Appeals, Second Circuit, judgement of 13 October 1995 (kidnapping, forced prostitution, forced pregnancies, torture and summary executions committed during the civil war in Bosnia as part of a genocide campaign, in line with a pattern of systematic human rights violations). *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadia (Greece), judgement of 30 October 1997 (crimes committed by German occupation forces against civilians and their property in the town of Distomo, Voiotia, during the Second World War). *Jaffe v. Miller and others*, Court of Appeal for Ontario, judgement of 17 June 1993 (kidnapping in Canada and transfer to Florida by United States government officials after a failed attempt to extradite the plaintiff). *A, B, C, D, E, F v. Jiang Zemin*, United States, 2002 (torture, genocide and violation of the right to life, liberty and the security of the person, and freedom of thought, conscience and religion, committed against Falun Gong members. The United States courts did not issue a decision, as they accepted the immunity suggested by the State Department). *Ferrini v. Germany*, Italy, Court of Cassation, judgement of 11 March 2004 (deportation to Germany of an Italian citizen who was subjected to forced labour and denied prisoner-of-war status). *Bouzari et al v. Islamic Republic of Iran; Attorney-General of Canada et al, intervenors*, Court of Appeal for Ontario, judgement of 30 June 2004 (kidnapping, illegal detention, torture and death threats). *Ali Saadallah Belhas et al. v. Moshe Ya'alon*, United States Court of Appeals, District of Columbia Circuit, judgement of 15 February 2008 (deaths and injury of persons who were in the United Nations compound during the shelling of Qana in 1996).

accidents.[64] In all cases, the issue of immunity has been linked to the actual or alleged status of the respondent or defendant as a State official.[65]

51. The responses of national courts to the question of immunity have varied; it cannot be concluded from the judicial decisions analysed that a consistent pattern has been uniformly followed. On the contrary, such decisions are based on different legal approaches and reasoning, in which national courts have taken into account the defendant's status as a State official, the nature of the acts for which immunity is invoked and, in some cases, the position taken by the government authorities of the forum State or the official's State.

52. With regard to cases in which national courts have granted immunity *ratione materiae*, the majority of judicial decisions have been based on the status of the official and the attribution to the State of the act carried out by that official. In that regard, it is useful to reproduce what the Special Rapporteur stated in her third report:[66]

> 34. ... in the cases where foreign officials have been afforded immunity from criminal jurisdiction *ratione materiae*, national courts have linked that immunity from jurisdiction to their status as agents of the State. The House of Lords, for instance, in a lawsuit brought against various Saudi officials, concluded that "all the individual defendants were at the material times acting or purporting to act as servants or agents" and "their acts were accordingly attributable to the Kingdom".[67] In another case adjudicated by the Federal Supreme Court of Germany, in which the conduct of British police officers was at issue, the Court stated that "Scotland Yard — and consequently its head — was acting as the expressly appointed agent of the British State so far as the performance of the treaty in question (...). The acts of such agents constitute direct State conduct and cannot be attributed as private activities to the person authorized to perform them".[68] The Supreme Court of Ireland took

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[64] *Mellerio c. Isabelle de Bourbon, ex-Reine d'Espagne* case, Court of Appeal of Paris, judgement of 3 June 1872 (non-payment of jewels acquired by the respondent). *Seyyid Ali Ben Hammond, Prince Rashid v. Wiercinski*, Tribunal civil de la Seine, judgement of 25 July 1916 (non-payment of debts incurred with a masseuse). *Ex-roi d'Egypte Farouk c. s.a.r.l. Christian Dior* case, Court of Appeal of Paris, judgement of 11 April 1957 (non-payment of suits acquired by the former King Farouk). *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgement of 28 April 1961 (rental of housing in an individual capacity). *Chiudian v. Philippine National Bank and Another*, United States Court of Appeals, Ninth Circuit, judgement of 29 August 1990 (the contested act is the non-payment of a debt incurred with the plaintiff, payment having been prevented as a result of an order issued by the Commission on Good Government created by the Government of the Philippines after the mandate of President Marcos ended). *Jungquist v. Sheik Sultan Bin Khalifa al Nahyan*, United States District Court, District of Columbia, judgement of 20 September 1996 (brain damage suffered by the daughter of the plaintiffs during a private outing, to which the defendant had invited her, and non-payment of medical expenses he had committed to paying).

[65] The various categories of State officials against whom proceedings have been brought in foreign courts, whether civil or criminal, were analysed in the third report of the Special Rapporteur. See A/CN.4/673, paras. 31-33.

[66] See A/CN.4/673, paras. 34 and 35. The footnotes in the original text have been retained, although they have been renumbered and simplified in the present report.

[67] *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, House of Lords (United Kingdom), judgement of 14 June 2006 (Lord Bingham of Cornhill, paras. 11 and 13).

[68] *Church of Scientology* case, Federal Supreme Court of Germany, judgement of 26 September 1978 (in *International Law Reports*, vol. 65, p. 198).

a similar position when it stated that a police officer "was purporting and intending to perform and in fact was performing the duties and functions of his office".[69] French courts have commented on this relationship between a prosecuted official and the State, noting in connection with the executive director of a maritime authority that "he is being held accountable for acts which he performed as part of his functions as a public official on behalf and under the control of the State of Malta".[70] In respect of the immunity from criminal jurisdiction of a former Minister of Defence of Senegal, they held that "[this minister,] because of the specificity of his functions and their primarily international scope, must be able to act freely on behalf of the State he represents".[71]

35. The relationship between an official and the State has also been taken into account in the reasoning of domestic courts that have entertained civil complaints against officials. Examples of this can be found in several United States precedents granting immunity from jurisdiction when an official was acting on behalf of the State, that is, "acting pursuant to (his) official capacity"[72] and "as an agent or instrumentality of the state".[73] Following this same principle, *a contrario sensu*, United States courts have held that a "lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts".[74]

53. In some cases, the courts did not only base their decision on the fact that the acts were carried out on behalf of the State but also ruled on the nature of the acts, emphasizing that they were carried out in the exercise of governmental authority or were sovereign acts, and noting that they constituted a performance of public

[69] *Schmidt v. Home Secretary of the Government of the United Kingdom*, Supreme Court (Ireland), judgement of 24 April 1997.

[70] *Agent judiciaire du trésor v. Malta Maritime Authority et Carmel X*, Court of Cassation, Criminal Chamber (France), judgement of 23 November 2004.

[71] *Association des familles des victimes du Joola* case, Court of Cassation, Criminal Chamber (France), judgement of 19 January 2010.

[72] *Ra'Ed Mohamad Ibrahim Matar et al. v. Avraham Dichter*, United States District Court, Southern District of New York, judgement of 2 May 2007.

[73] *Ali Saadallah Belhas et al. v. Moshe Ya'alon*, United States Court of Appeals, District of Columbia Circuit, judgement of 15 February 2008.

[74] *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court, New York County (United States of America), judgement of 31 October 1988; *Chiudian v. Philippine National Bank and Another*, United States Court of Appeals, Ninth Circuit, judgement of 29 August 1990; *Maximo Hilao, et al., Vicente Clemente et al., Jaime Piopongco et al. v. Estate of Ferdinand Marcos*, United States Court of Appeals, Ninth Circuit, judgement of 16 June 1994; *Teresa Xuncax, Juan Diego-Francisco, Juan Doe, Elizabet Pedro-Pascual, Margarita Francisco-Marcos, Francisco Manuel-Méndez, Juan Ruiz Gómez, Miguel Ruiz Gómez and José Alfredo Callejas v. Héctor Gramajo and Diana Ortiz v. Héctor Gramajo*, United States District Court, District of Massachusetts, judgement of 12 April 1995; and *Bawol Cabiri v. Baffour Assasie-Gyimah*, United States District Court, Southern District of New York, judgement of 18 April 1996.

functions.[75] In that regard, a United States court ruled that the civilian and military officials involved in the planning and execution of a bombing in Libya acted in their official capacities and upon the orders of the Commander in Chief (President Reagan) and therefore enjoyed immunity.[76] In a case before the Swiss courts, it was decided that immunity *ratione materiae* could be awarded only in respect of "acts performed in the exercise of official duties".[77]

54. In a few cases, national courts have ruled on the meaning of "sovereign activity of the State" and have even connected it to the concept of *acta jure imperii*. In one case in Germany, the Federal Supreme Court concluded that "under German public law the exercise of police power unquestionably formed part of the sovereign activity of the State and was to be termed an act *iure imperii*. The exercise of such power could not therefore be excluded from immunity".[78] In another case, the German Constitutional Court identified as acts that fall under the "sphere of State authority" transactions relating to foreign affairs and military authority, the legislature, the exercise of police authority and the administration of justice.[79] In a similar vein, a United States court included among "strictly political or public acts" internal administrative acts, such as expulsion of an alien; legislative acts, such as nationalization; acts concerning the armed forces; acts concerning diplomatic activity; and public loans.[80] For their part, the French courts have defined as unequivocal acts of sovereignty acts in the service of the administration of justice,[81]

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[75] In this respect, in the *Gaddafi* case, the Court of Appeal of Paris referred in its judgement of 20 October 2000 to "acts of governmental authority or public administration" and concluded that the charges constituted international crimes and therefore did not fall under the category of "functions of a head of State". On the basis of that argument, it concluded that such acts constituted an exception to immunity. Subsequently, in its judgement of 13 March 2001, the Court of Cassation granted immunity on the basis of its decision that the exception that had been invoked did not exist. However, it remained silent with regard to the Court of Appeal's previous characterization of the acts. In the case concerning the ship *Erika* and the Malta Maritime Authority, the term "act of governmental authority" and "acts based on State sovereignty" are used and contrasted with simple "acts of management" (included as examples of the exercise of State functions are the attribution of a flag to a ship and the issuance and maintenance of a navigation licence — which are all administrative acts of the State — as well as the obligation to monitor vessels flying the national flag of the State).

[76] *Saltany v. Reagan et al.* United States District Court, District of Columbia, judgement of 23 December 1988.

[77] The Swiss Federal Criminal Court uses the term "acts performed in the exercise of official duties" in the case *A. v. Office of the Public Prosecutor of the Confederation* (Nezzar case), Federal Criminal Court of Switzerland (case No. BB.2011.140), judgement of 25 July 2012.

[78] *Church of Scientology* case, Federal Supreme Court of Germany, judgement of 26 September 1978; 65 *ILR* 193. In the case *Propend Finance Pty Ltd. v. Sing*, (England, Court of Appeal, 1997; 111 *ILR* 611), the court made a similar ruling, affirming that the conduct of police functions was essentially a form of exercise of governmental activity. A United States court also concluded that police activities are official acts, however monstrous they may be, see *Saudi Arabia v. Nelson*, United States Supreme Court, 100 *ILR* 544.

[79] *Empire of Iran* case, German Federal Constitutional Court, 1963, 45 *ILR* 57. The activities of a member of the armed forces were also defined as an official act in *Lozano v. Italy* (case No. 31171/2008, ILDC 1085), judgement of 24 July 2008.

[80] *Victory v. Comisaria*, US 336 F.2d 354 (Second Circuit, 1964); 35 *ILR* 110.

[81] Case No. 12-81.676, Court of Cassation, Criminal Chamber, judgement of 19 March 2013, and Case No. 13.80.158, Court of Cassation, Criminal Chamber, judgement of 23 November 2084. The Swiss courts made a similar ruling in the case ATF 130 III 136, which concerns an international detention order issued by a Spanish judge.

as well as certain administrative acts associated with the flagging of a vessel.[82] Other courts have defined as acts that imply the exercise of sovereignty those relating to Israeli policies on settlements in the occupied territories,[83] the expulsion of aliens,[84] the confiscation of property by police forces,[85] the issuance of reports on the activity of staff serving at a military base abroad[86] and even the hiring of thugs to intimidate members of a certain religious group.[87]

55. In a number of cases, *a contrario sensu*, national courts have concluded that the act in question exceeded the limits of official functions, or functions of the State, and was therefore not covered by immunity. For example, courts have concluded that the assassination of a political opponent[88] or acts linked to drug trafficking[89] do not constitute official acts. More generally, a court of the United States of America concluded that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do". According to that court, the "FSIA [Foreign Sovereign Immunity Act] does not immunize the illegal conduct of government officials" and thus, "an official acting under colour of authority, but not within an official mandate, can violate international law and not be entitled to immunity under FSIA".[90] Another United States court concluded even more explicitly that *ultra vires* acts are not subject to sovereign immunity, as the perpetrators acted beyond their authority by violating the human rights of the plaintiffs. If officials commit acts that are not officially sanctioned by the State, that is, if they are not "officials acting in an official capacity for acts within the scope of their authority", they cannot benefit from immunity.[91] In any case, such *ultra vires* acts should be differentiated from unlawful acts; several courts have concluded that unlawful acts are not exempt from immunity simply because they are unlawful,[92] even in cases when the act is contrary to international law.[93]

56. However, it should be noted that the arguments referred to in the preceding paragraphs have not always been applied uniformly in relation to a single category of criminal acts. On the contrary, immunity *ratione materiae* has on some occasions been recognized for a given offence, while on other occasions, the courts have

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[82] *Malta Maritime Authority* case, No. 04-84.265, Court of Cassation, Criminal Chamber, judgement of 23 November 2004.

[83] *Doe I v. Israel*, US, 400 F. Supp. 2d 86, 106 (DDC 2005).

[84] *Kline v. Kaneko*, US, 685 F. Supp. 386 (SDNY 1988); 101 *ILR* 497.

[85] *First Merchants v. Argentina*, US, 190 F. Supp. 2d 1336 (SD Fla. 2002).

[86] *Holland v. Lampen-Wolf* (United Kingdom), [2000] 1 *WLR* 1573.

[87] *Youming* case, US, 557. F. Supp. 2d 131 (DDC 2008).

[88] *Letelier v. Chile*, US, 748 F. 2d 790 (Second Circuit, 1984); 79 *ILR* 561.

[89] *Jimenez v. Aristeguieta*, 311 F. 2d 547 (US, Court of Appeals, Fifth Circuit, 1962); *United States v. Noriega*.

[90] *Hilao, et al v. Marcos*, United States Court of Appeals, Ninth Circuit, judgement of 16 June 1994. In the Court's view, acts of torture, execution and disappearances were actions performed by Marcos and were not taken within any official mandate; they could not be regarded as the acts of an agency or instrumentality of a foreign State.

[91] *In Re Doe I, et al. v. Liu Qi, et al., Xia Deren et. al.*, United States District Court, Northern District of California (C-02-0672 CW, C-02-0695 CW).

[92] *Jaffe v. Miller and others*, Court of Appeal for Ontario, judgement of 17 June 1993. *Republic of Argentina v. Amerada Hess*, 81 *ILR* 658; *McElhinney v. Williams*, Ireland, 1995, 104 *ILR* 691.

[93] *I Congreso del Partido* case, England, 1981, [1983] 1 AC 244; 64 *ILR* 307. In *Jones v. Saudi Arabia*, Lord Hoffman rejected the argument that an act contrary to *jus cogens* could not be an official act.

decided that the same offence does not meet the requirements to be covered by immunity. Moreover, in some cases this has occurred in decisions rendered by courts of the same State. The prime example of this divergence in jurisprudence is the response of the British courts in respect of torture. The House of Lords, in the *Pinochet No. 3* case, stated that the former President of Chile could not benefit from immunity *ratione materiae* because it considered that the Convention against Torture imposed on States parties the obligation to prosecute acts of torture, and that, consequently, it was not possible to apply any type of immunity to such acts.[94] However, that did not constitute a definitive court ruling on the nature of torture as an "act performed in an official capacity", since out of the seven Law Lords, only two concluded that it did not constitute an official act, while the others believed that the acts with which General Pinochet had been charged bore some form of official status, although four of those concluded that they were nevertheless criminal acts.[95] The same House of Lords, in *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, recognized the immunity *ratione materiae* of several Saudi citizens on the grounds that the conduct of all of the defendants was in discharge or purported discharge of their duties as servants or agents of Saudi Arabia and that, therefore, all acts performed by them, including torture, were attributable to that State and were covered by immunity.[96] Lastly, the recent decision taken in *FF v. Director of Public Prosecutions* (*Prince Nasser* case), a British court, applying the same doctrine as in *Pinochet No. 3*, concluded that Prince Nasser bin Hamad Al Khalifa, son of the King of Bahrain and Commander of the Royal Guard, did not benefit from immunity *ratione materiae* in respect of the crime of torture.[97] The British courts appear to have decided the cases under question differently in view of the criminal nature of the proceedings in the *Pinochet* and *Prince Nasser* cases and the civil nature of the proceedings in the *Jones* case.

57. These cases highlight the particular problem surrounding torture, which has also been raised before other courts. In a case brought before the Belgian courts, torture was defined as an act that cannot be regarded as falling within the normal exercise of the functions of a Head of State, one of whose tasks is specifically to ensure the protection of his fellow citizens.[98] A Dutch court expressed a similar opinion.[99] The aforementioned divergence regarding the categorization of certain forms of conduct as acts performed in an official capacity has generally arisen with

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[94] *Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)*, UKHL 17, [2000] 1 A.C. 147. The decision was taken by six votes to one; only Lord Goff believed that they were official acts that benefited from immunity.

[95] Only Lord Brown Wilkinson and Lord Hutton stated that torture cannot be "a public function" or "a governmental function". Lord Goff, dissenting, concluded that it was a "governmental function", while similar statements were expressed by Lord Hope ("criminal yet governmental"), Lord Saville (who referred to "official torture"), Lord Millett ("public and official acts") and Lord Philips ("criminal and official").

[96] *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, House of Lords (United Kingdom), judgement of 14 June 2006.

[97] *FF v. Director of Public Prosecutions* (Prince Nasser case), High Court of Justice, Queen's Bench Division, Divisional Court, judgement of 7 October 2014 [2014] EWHC 3419 (Admin). The significance of this ruling is the fact that it was issued as a "consent order", that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter accepted that the charges of torture against Prince Nasser were not covered by immunity *ratione materiae*.

[98] *Pinochet* case, Examining Magistrate of Brussels, Order of 6 November 1998.

[99] *Bouterse* case, R 97/163/12 Sv and R/97/176/12 Sv, Court of Appeal of Amsterdam, 2000.

respect to international crimes. In a number of cases, courts have considered that crimes under international law are not part of the functions of the State and, consequently, they have not recognized immunity. In other cases, however, courts have considered that these are acts clearly exercised in an official capacity, even if they are illegal and abusive, and have therefore granted immunity. A Greek court found that crimes committed by armed forces are acts attributable to the State for the purposes of international responsibility, but cannot be considered as sovereign acts for the purposes of State immunity.[100] It should also be noted that, in some cases, courts have referred to crimes under international law as exceptions to immunity, based on various arguments.[101]

58. Nonetheless, it is worth highlighting that, in general, national courts have denied immunity in cases linked to corruption, whether in the form of diversion or misappropriation of public funds or money-laundering, or any other type of corruption. In that regard, attention is drawn to the case *Teodoro Nguema Obiang Mangue*, in which the French courts have twice ruled on immunity, affirming that the misappropriation of public funds and money-laundering "are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity"[102] and that the acts Mr. Nguema Obiang Mangue is charged with, by their nature, do not relate to the exercise of sovereignty or governmental authority, nor are they in the public interest.[103] Following the same logic, courts have not accepted that acts performed by State officials that are closely linked to a private activity and for the official's personal enrichment, not the benefit of the sovereign, are covered by immunity.[104]

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[100] *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadia (Greece), judgement of 30 October 1997.

[101] The Court of Appeal for Ontario, *Bouzari and others v. Islamic Republic of Iran*, judgement of 30 June 2004, examined torture from the perspective of an exception to immunity, but found that it is not possible to establish such an exception. The Court of Appeal of Florence, in the *Ferrini* case, determined that "functional immunity" cannot be invoked with regard to acts constituting international crimes. In the *Nezzar* case, the Federal Criminal Court of Switzerland drew attention to the fact that "it would be difficult to admit that conduct contrary to fundamental values of the international legal order can be protected by rules of that very same legal order".

[102] Court of Appeal of Paris, *Pôle* 7, second investigating chamber, judgement of 13 June 2013.

[103] Court of Appeal of Paris, *Pôle* 7, second investigating chamber, application for annulment, judgement of 16 April 2015. The statement cited was made by the Court after re-examining the arguments and statements of the judgement of 13 June 2013.

[104] *United States v. Noriega*, United States Court of Appeals, Eleventh Circuit, judgement of 7 July 1997. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, United States District Court, District of Columbia, judgement of 20 September 1996. *Mellerio c. Isabelle de Bourbon, ex-Reine d'Espagne. Seyyid Ali Ben Hammoud, Prince Rashid v. Mercinski*, Tribunal civil de la Seine, judgement of 25 July 1916. *Ex-roi d'Egypte Farouk c. s.a.r.l. Christian Dior*, Court of Appeal of Paris, judgement of 11 April 1957. *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgement of 28 April 1961. *Trajano v. Marcos*, US, 978 F. 2d 493 (Ninth Circuit, 1992), 103 *ILR* 521. *Doe v. Zedillo Ponce de León. Jimenez v. Aristeguieta* (1962), 32 *ILR* 353. *Jean-Juste v. Duvalier* (1988), No. 86-0459 Civ (US District Court), SD Fla. *Adamov v. Federal Office of Justice*, judgement of 22 December 2005. *Republic of the Philippines v. Marcos et al.* (1986), 81 *ILR* 581. *Republic of the Philippines v. Marcos et al.* (No. 2) (1987, 1988), 81 *ILR* 609. *Republic of Haiti v. Duvalier* [1990] 1 QB 202 (United Kingdom). *Islamic Republic of Iran v. Pahlavi* (1984), 81 *ILR* 557 (United States): in this case it was the United States Government that informed the Court that the claim should not be barred either by application of the sovereign immunity principle or by the act of State doctrine.

59. In some cases, the issue has been brought before domestic courts under the umbrella of the so-called "act of State doctrine", which — as mentioned above — is sometimes confused in practice with immunity *stricto sensu*. Thus, in a case before the Federal Supreme Court of Germany, the accused parties invoked "the act of State doctrine", arguing that the doctrine did not allow for them to be prosecuted because they had been following orders and acting in the interest of a foreign State [105] Another court accepted that, in accordance with the act of State doctrine, "courts generally refrain from judging the acts of a foreign State within its territory"; however, that did not prevent it from concluding that under no circumstances could the doctrine lead to "the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, [being] properly characterized as an act of State".[106] Moreover, in some cases, courts have found that the "act of State" doctrine, understood as grounds for relieving an official from responsibility, cannot, under any circumstances, be applied to international crimes.[107]

60. Lastly, it should be noted that in a number of cases brought before courts in the United States, immunity has been granted or refused without assessing the acts performed by a State official, but simply on the basis of the "suggestion" of immunity submitted by the United States authorities in accordance with common law principles.[108] On other occasions, the courts have not ruled on immunity for different reasons, such as when the State that officials served has ceased to exist or when the country in question is not considered to be a State.[109] Such cases are not, therefore, relevant for the purposes of defining the criteria for identifying "acts performed in an official capacity".

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[105] *Border Guards* case, Federal Supreme Court of Germany, judgement of 3 November 1992 (case No. 5 StR 370/92). The foreign State to which the accused parties referred was the German Democratic Republic (GDR), which had already ceased to exist when the criminal proceedings began. The Federal Supreme Court considered that the doctrine was not applicable and the appeal was not admitted for a simple reason: "the GDR no longer exists" (pp. 272-273).

[106] *Kadic v. Karadžić*, United States Court of Appeals, Second Circuit, judgement of 13 October 1995. The respondent had invoked both the "act of State doctrine" and the "political question" as exceptions in order to have the case dismissed.

[107] *Eichmann* case. This finding is also closely associated with the Nürnberg trials, the judgements of the Tribunal and the Nürnberg Principles affirmed by the General Assembly.

[108] *Lafontant v. Aristide*, United States District Court, Eastern District of New York, judgement of 27 January 1994. *A, B, C, D, E, F v. Jiang Zemin*, October 2002: this case is significant because, once Jiang Zemin's term in office as President ended in 2003, a group of Democrat members of the United States Congress attempted to reopen the case, though without success, as the State Department maintained its suggestion of immunity. In a similar vein, in *Republic of the Philippines v. Marcos et al.*, the court did not classify the facts, but merely affirmed that immunity is lost when the defendant is no longer Head of State and it is the Government of the said State that is the plaintiff. In the *Ya'alon* case, the court took into consideration a letter from the Israeli Ambassador in Washington confirming that the acts performed by the official had been undertaken in the course of his official duties.

[109] The disappearance of the State was taken into consideration in *Border Guards*, Federal Supreme Court of Germany, judgement of 3 November 1992 (case No. 5 StR 370/92). Furthermore, the Court of Cassation of Italy, because it considered that the Palestine Liberation Organization (PLO) could not be regarded as a State, did not rule on immunity in the case *Yasser Arafat (Carnevale re. Valente — Imp. Arafat e Salah)*, judgement of 28 June 1985.

(iii) Treaty practice

61. The articles of a number of multilateral treaties include references, phrased in different ways and from different perspectives, to "acts performed in an official capacity". One group of instruments includes various United Nations conventions that directly or indirectly refer to immunities. A second group comprises treaties, both universal and regional, within the category of rules of international criminal law, that describe conduct prohibited by international law and, in some instances, include a reference to the official nature of the act in the definition thereof.

62. The Vienna Convention on Diplomatic Relations of 18 April 1961 falls within the first group of instruments and is based on the understanding that the immunity from jurisdiction of diplomatic agents is immunity *ratione personae*, which applies throughout their term in office, to all acts performed by them in both an official and a personal capacity; it therefore does not contain any definition of an act performed in an official capacity.[110] However, the Convention also establishes rules relating to the immunities of members of the administrative, technical and service staff of the mission which combine characteristics of immunity *ratione personae* and immunity *ratione materiae*.[111] It also contains certain provisions concerning immunity *ratione materiae stricto sensu*. In that connection, attention is drawn to several provisions of the Convention that help define the concept of "acts performed in an official capacity" for the purposes of this report:

(i) While the immunity from jurisdiction of diplomatic agents is understood as immunity *ratione personae* and thus as full immunity, the Convention establishes certain exceptions, according to which immunity from civil and administrative jurisdiction shall not apply in the following circumstances: "(a) [Real actions] relating to private immovable property situated in the territory of the receiving State, unless [the diplomatic agent] holds it on behalf of the sending State for the purposes of the mission; (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."[112] Such acts are, therefore, exceptions to immunity *ratione personae*, exceptions that are justified because they concern acts performed by a diplomatic agent in a private capacity and for his or her own benefit. By the same logic, such acts cannot be considered "acts performed in an official capacity" for the purposes of the immunity *ratione materiae* of diplomatic agents, to which the Convention also refers. This provision should also be read in conjunction with the prohibition contained in article 42, in accordance with which "a diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity".

(ii) The scope of the immunity of administrative and technical staff is limited; the Convention provides that their immunity from civil and

[110] See art. 31.

[111] See, in general, art. 37.

[112] See art. 31, para. 1.

administrative jurisdiction "shall not extend to acts performed outside the course of their duties".[113]

(iii) Service staff shall only "enjoy immunity in respect of acts performed in the course of their duties".[114]

(iv) A diplomatic agent who is a national of or permanently resident in the receiving State shall enjoy only immunity in respect of "official acts performed in the exercise of his functions",[115] so as to ensure that, as pointed out by the International Law Commission at the time, the said diplomatic agents should "enjoy at least a minimum of immunity to enable [them] to perform [their] duties satisfactorily".[116] Clearly such immunity corresponds to the category of immunity *ratione materiae* and acts covered by that immunity will be "acts performed in an official capacity".

(v) Upon expiry of the term of office of diplomatic agents and members of administrative, technical and service staff, immunity ceases, although the Convention provides that "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist".[117] Such immunity is immunity *ratione materiae*, only applying to acts specific to the exercise of the functions of mission staff, which should therefore be regarded as "acts performed in an official capacity" for the purposes of this report.

63. Consequently, it can be concluded that, in accordance with the Vienna Convention on Diplomatic Relations, an "act performed in an official capacity" is an act that occurs in "the exercise of the functions" of members of the mission. However, the Convention does not identify specific acts that are to be regarded as "acts performed in an official capacity", with the sole exception, *a contrario sensu*, of the acts referred to in article 31, paragraph 1, and article 42, which are to be regarded as private acts. In the other instances, the "act performed in an official capacity" is defined by reference to the functions of the mission itself and of the official within the mission, meaning that the question of whether a given act falls into that category must be resolved on a case-by-case basis. The Convention does not establish precise rules for doing so, except for the references in article 3, paragraph 1, to the functions of the diplomatic mission and activities of the members of the mission. With regard to the specific functions of the members of the mission, it should be borne in mind that the Convention is unclear and does not include elements for identifying those functions in general; it only mentions in vague terms the "administrative and technical service of the mission" and "the domestic service of the mission".[118] Nevertheless, the wording of the Convention is more explicit in referring to the functions of the diplomatic mission, which are listed as follows: "(a) Representing the sending State in the receiving State; (b) Protecting

[113] See art. 37, para. 2. It should be noted that immunity applies only to administrative and technical staff that are not nationals of or permanently resident in the receiving State.

[114] See art. 37, para. 3. It should be noted that immunity applies only to service staff that are not nationals of or permanently resident in the receiving State.

[115] See art. 38, para. 1.

[116] *Yearbook of the International Law Commission*, 1958, vol. II, p. 102 (United Nations publication, Sales No. E.58.V.1). See para. (3) of the commentary to art. 37.

[117] See art. 39, para. 2.

[118] See art. 1 (f) and (g).

in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) Negotiating with the Government of the receiving State; (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. It may also perform consular functions.[119] While this list allows for the inclusion of a number of specific acts, very distinct in nature, within the category of "acts performed in an official capacity", there is no doubt that such acts must be necessary in order to perform the aforementioned functions, that they must be unequivocally public and official in nature, and, in the case of diplomatic agents, that they must be closely linked to the concept of sovereignty and the exercise of elements of the governmental authority.

64. The Convention on Special Missions of 8 December 1969[120] and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975[121] follow a model similar to that outlined above. The Vienna Convention on Consular Relations of 24 April 1963, meanwhile, reflects even more clearly the link between immunity and the exercise of specific functions on behalf of the State, since, under that Convention, immunity covers only "acts performed in the exercise of consular functions".[122] Furthermore, immunity from jurisdiction does not apply in respect of a civil action

[119] See art. 3, paras. 1 and 2.

[120] The 1969 Convention links the "official status of the act" to the fact that it is performed in exercise of functions that are specific to the mission and to the members of the mission, including the aforementioned limitations in relation to the prohibition on representatives of the State and members of its diplomatic staff practising "for personal profit any professional or commercial activity in the receiving State" (art. 48), as well as the provision limiting the immunity of representatives of the sending State in the special mission and members of its diplomatic staff who are nationals of or permanently resident in the receiving State to "official acts performed in the exercise of their functions" (art. 40). However, as is the case with the Vienna Convention on Diplomatic Relations, the Convention on Special Missions does not contain a list of "official acts". Moreover, the definition of the functions of a special mission is more generic and imprecise than the definition of those of a diplomatic mission; it simply states that a special mission "[represents] the State, [being] sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task" (art. 1 (a)). It must therefore be concluded that, under this Convention as well, "acts performed in an official capacity" must be identified on a case-by-case basis, using the criteria of "official status" and "functional status". By the very nature of special missions, those two criteria are less precisely defined, although such acts must still be linked to the performance of official functions and State sovereignty.

[121] The 1975 Convention takes into consideration the same elements mentioned above, from which it can be concluded that the performance of official acts within the context of the functions of the mission or delegation is the precondition for recognition of immunity *ratione materiae* (arts. 30, 36 (2), 36 (3), 60, 66 (2) and 66 (3)). The official and functional dimension of the acts that may be covered by such immunity is reinforced by the fact that the Convention prohibits the head of mission and members of the diplomatic staff from practising "for personal profit any professional or commercial activity in the host State" (art. 39). It also provides that persons who are nationals of or permanently resident in the host State shall enjoy only immunity from jurisdiction in respect of "official acts performed in the exercise of their functions" (arts. 36 and 37). However, the 1975 Convention, like the 1969 Convention, does not contain a list of what are "acts performed in an official capacity", meaning that they must be identified on a case-by-case basis, using the aforementioned criteria of "official status" and "functional status".

[122] See art. 43, para. 1.

"arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State".[123] While this Convention, like the two aforementioned, does not list the acts that are to be regarded as "performed in an official capacity", meaning that again they must be determined on a case-by-case basis in the light of the consular functions listed in article 5,[124] the fact remains that the more specific list of consular functions contained in that article makes it possible to define with greater certainty some acts that should be categorized as "acts performed in an official capacity". In any case, there is no doubt that the said functions are manifestations of governmental authority and are linked to State sovereignty. Lastly, it should be noted that the Convention does not recognize the immunity of consular officers from

[123] See art. 43, para. 2.

[124] Art. 5 of the 1963 Convention lists the following consular functions: "(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; (b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention; (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested; (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State; (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State; (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State; (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State; (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons; (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests; (j) transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State; (k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews; (l) extending assistance to vessels and aircraft mentioned in subparagraph (k) of this article, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen insofar as this may be authorized by the laws and regulations of the sending State; (m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State".

criminal jurisdiction,[125] though that does not preclude the parameters outlined above being used as guiding elements for defining the concept of an "act performed in an official capacity".

65. To conclude this analysis of the first group of multilateral conventions, it is worth noting that the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 may also be taken into consideration for the purpose of defining an "act performed in an official capacity", particularly since, as was made clear by the International Law Commission, the reference in article 2, paragraph 1, of the Convention to "the State and its various organs of government" and to "representatives of the State acting in that capacity" is to be understood from the perspective of immunity *ratione materiae*.[126] However, for the purposes of this report the provisions of the 2004 Convention should be subject to a nuanced analysis, taking into account, in particular, two aspects, namely: (i) that the Convention does not apply to criminal jurisdiction;[127] and (ii) that the underlying distinction between *acta jure imperii* and *acta jure gestionis* is not comparable to the distinction between "acts performed in an official capacity" and "acts performed in a private capacity" which is examined in the present report. That said, the 2004 Convention is of interest for our analysis, since, for the purposes of determining State immunity, it focuses on the attribution to the State of acts performed by its officials and requires there to be a demonstrable link between the act and the exercise of sovereignty by the State in order for the act to be covered by immunity.

66. With regard to international criminal law, attention should first be drawn to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which includes a reference to the official nature of the act as one of the elements in the definition of torture itself by stipulating that the "pain or suffering" of victims must have been "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (article 1, paragraph 1, *in fine*). Article 2, paragraph 3, of the Convention refers to orders from superiors as those that come from "a superior officer or a public authority". Lastly, in establishing the obligation of States to criminalize torture in their domestic laws, it once again refers expressly to "a public official or other person acting in an official capacity" (article 16, paragraph 1).[128] In

[125] Nevertheless, the Convention provides that all criminal proceedings must be conducted "with the respect due to [the consular officer] by reason of his official position and ... in a manner which will hamper the exercise of consular functions as little as possible" (art. 41, para. 3). The Convention makes this same stipulation with respect to "honorary consular officers" subject to criminal jurisdiction (see art. 63).

[126] In that connection. the Commission's commentary on art. 2 (paras. (6), (8) and (17)) and art. 3 (para. (1)) of the draft articles on jurisdictional immunities of States and their property, adopted on second reading in 1991, are pertinent. See *Yearbook of the International Law Commission*, 1991, vol. II, Part Two (United Nations publication, Sales No. E.93.V.9 (Part 2)).

[127] In that regard, see the commentary of the International Law Commission to draft art. 3, provisionally adopted in 2013, in particular para. (4) and footnote 274 (*Report of the International Law Commission on its sixty-fifth session*, A/68/10, para. 49).

[128] In addition to these explicit references to officials and public authorities, the following categories of persons are mentioned in art. 10, para. 1, on training measures for the prevention of torture: "law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment".

its interpretation of those provisions in its general comments,[129] the Committee against Torture indicated that the prohibited acts are those carried out by "all persons who act, de jure or de facto, in the name of ... the State",[130] by "its officials and those acting on its behalf"[131] or by "State authorities or others acting in official capacity",[132] stating that such persons are "are acting in an official capacity on account of their responsibility for carrying out the State function".[133] Furthermore, the Committee uses the term "agents"[134] of the State in its general comment No. 3, when it indicates that granting immunity to certain persons is in conflict with the Convention. The official status of the act is thus, prima facie, an undeniable component of torture.

67. The Inter-American Convention to Prevent and Punish Torture of 9 December 1985 also includes the element of "official status", drawing attention to the connection with the State and the official nature of the acts in question, although it does not refer to the participation of a public official as an element in the definition of the crime.[135] However, the list of persons to be held guilty of the crime of torture shows that the involvement of a public official is a necessary element in order for an act to be defined as torture:

> a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
>
> b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.[136]

68. The necessary connection between a public official and the act of torture seems to break down in the Rome Statute of the International Criminal Court. In classifying torture as a crime against humanity[137] and a war crime,[138] the Statute does not specify what persons may be deemed to have committed the crime of torture, which could lead to the conclusion that the connection with the State and the official nature of the act are no longer required in order for an act to be regarded as

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[129] In paras. 3 and 8 (b) of the general comment on the implementation of article 3 of the Convention in the context of article 22, adopted on 21 November 1997, the Committee refers to "a public official or other person acting in an official capacity" (see Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), annex IX). In general comment No. 2, on the implementation of article 2 by States parties, of 24 January 2008, the Committee refers to "officials and others ... acting in official capacity" (para. 15) and "officials" (para. 18) (see CAT/C/GC/2). In general comment No. 3, on the implementation of art. 14 by States parties, of 13 December 2012, the Committee refers to "State authorities or others acting in their official capacity" (para. 7) and to "public officials" (para. 18) (see CAT/C/GC/3).

[130] See general comment No. 2, para. 7.

[131] See general comment No. 2, para. 7.

[132] See general comment No. 2, para. 18, and general comment No. 3, para. 7.

[133] See general comment No. 2, para. 17.

[134] See general comment No. 3, para. 42.

[135] See art. 2.

[136] See art. 3.

[137] See art. 7, para. 1 (f).

[138] See art. 8, para. 2 (a) (ii) and (c) (i).

torture.[139] However, that conclusion must be qualified if it is to be maintained. Thus, in the case of torture as a crime against humanity, it should be recalled that it must necessarily be "committed as part of a widespread or systematic attack directed against any civilian population."[140] Similarly, in the case of torture as a war crime, it must have been carried out "as part of a plan or policy or as part of a large-scale commission of such crimes."[141] The implications of both of these cases are discussed below.[142]

69. The International Convention for the Protection of All Persons from Enforced Disappearance is also of relevance. Following the same approach as the Rome Statute, it defines enforced disappearance as:

> The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[143]

70. The "official status" of this type of criminal conduct is also reflected in the Inter-American Convention on Forced Disappearance of Persons, which defines forced disappearance as:

> The act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[144]

71. The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 does not include the "official status" of the perpetrator as an element of the definition of the crime. However, article IV of that Convention explicitly states that the offence may be committed by "constitutionally responsible rulers, public officials or private individuals". It can therefore be concluded that under certain circumstances the crime can be regarded as an "act performed in an official capacity". Furthermore, it is undeniable that, as has been indicated in the Commission's own work, genocide involves a series of acts that would be difficult to perform without the participation, support or consent of the State.[145]

72. An analysis of the Rome Statute of the International Criminal Court of 17 July 1998 is also useful for categorizing certain crimes as "acts performed in an official capacity". As indicated above, the Statute provides that, in order for acts to be

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[139] Likewise, the section of *Elements of Crimes* referring to those crimes does not contain any reference to the official status of the perpetrators.

[140] See the chapeau of art. 7, para. 1, art. 7, para. 2 (a) and para. 3 of the introduction to art. 7 in *Elements of Crimes*.

[141] See art. 8, para. 1.

[142] See para. 72.

[143] International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

[144] Inter-American Convention on Forced Disappearance of Persons of 9 June 1994, art. II.

[145] See below, paras. 91 and 93.

considered crimes against humanity they must be "committed as part of a widespread or systematic attack directed against any civilian population", where "attack" means "a course of conduct involving the multiple commission of [crimes against humanity] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[146] Such a policy "requires that the State or organization actively promote or encourage such an attack against a civilian population."[147] Consequently, the commission of a crime listed in article 7, paragraph 1, of the Rome Statute could be regarded as an "act performed in an official capacity" in the sense in which the phrase is used in this report.

73. However, the official nature of the act is most clearly reflected in the definition of the crime of aggression in article 8 *bis* of the Rome Statute. In accordance with that article, the crime of aggression is a "crime of leaders" that can be committed only by "a person in a position effectively to exercise control over or to direct the political or military action of a State" and involves the commission by the commander or leader of a series of actions relating to an "act of aggression",[148] which, according to the Statute, is "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."[149] In sum, it seems that the only possible conclusion is that the crime of aggression, as defined in the Rome Statute, must be regarded as an "act performed in an official capacity".

74. Lastly, it is useful to refer to the various universal and regional conventions against corruption. The United Nations Convention against Corruption of 31 October 2003 lays down regulations concerning various acts of corruption that might be carried out by State officials. All such acts are directly related to the official functions of those persons but are performed with the aim of obtaining "an undue advantage, for the official himself or herself or another person or entity".[150] It should also be noted that the Convention addresses the issue of immunity of State officials (although from an internal perspective). In that regard, it imposes on each State party the obligation to:

> Take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with (the) Convention.[151]

75. The Inter-American Convention against Corruption of 29 March 1996 also addresses acts of corruption carried out by "a government official or a person who performs public functions" in relation to the performance of functions which have

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[146] See the chapeau of art. 7, para. 1, and art. 7, para. 2 (a).

[147] See para. 3 of the introduction to art. 7 in *Elements of Crimes*.

[148] See art. 8 *bis*, para. 1. Similarly, see *Elements of Crimes*, Crime of aggression, para. 2.

[149] See art. 8 *bis*, para. 2. This definition is reiterated in *Elements of Crimes*, which stipulates that the "act of aggression" must have been committed (see para. 3).

[150] The following crimes are mentioned: (i) bribery of national public officials (art. 15); (ii) bribery of foreign public officials and officials of public international organizations (art. 16); (iii) embezzlement, misappropriation or other diversion of property by a public official (art. 17); (iv) trading in influence (art. 18); (v) abuse of functions (art. 19); (vi) illicit enrichment (art. 20); and (vii) bribery in the private sector (art. 21).

[151] See art. 30, para. 2.

been entrusted to that person by the State. Again, the act must have been committed for the specific purpose of obtaining "any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity", or simply "illicitly obtaining benefits for himself or for a third party".[152] It should also be noted that the Inter-American Convention explicitly states that none of those acts shall qualify as "a political offence or as a common offence related to a political offence" simply because the property obtained was intended for political purposes or because the act itself was committed for political motives or purposes.[153]

76. The Council of Europe Criminal Law Convention on Corruption of 27 January 1999 also defines certain actions as acts of corruption which must be criminalized by States. These are acts committed by domestic or foreign "public officials", members of domestic, foreign or international assemblies, or judges or officials of international courts. As in the two aforementioned conventions, such acts involve both the performance of a public function and a purposive element, namely that the act of corruption is performed with the purpose of obtaining "any undue advantage ... for himself or herself or for anyone else".[154] The Council of Europe Convention also refers to immunity, in this case from an international perspective, establishing that "the provisions of (the) Convention shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity."[155] This obscure provision has been interpreted by the Council of Europe itself as recognition that States parties are obliged to give effect to the provisions governing privileges and immunities to which they may be subject (whether deriving from treaties or from customary law) when seeking to exercise jurisdiction in respect of the crimes mentioned in the Convention, particularly with regard to "public international or supranational organizations ... members of international parliamentary assemblies ... as well as judges and officials of international courts".[156]

77. Lastly, the African Union Convention on Preventing and Combating Corruption of 11 July 2003 also envisages the possibility that a public official may commit acts of corruption in connection with the discharge of his or her duties for the purpose of obtaining "benefits for himself or herself or for a third party".[157]

(iv) Other work of the International Law Commission

78. As already mentioned in the Special Rapporteur's third report, the International Law Commission has previously undertaken work on a number of topics involving the consideration of issues related to immunity that are relevant for the purposes of defining the concept of an "act performed in an official capacity". While its work on the articles on responsibility of States for internationally wrongful acts is certainly of greatest relevance, its deliberations resulting in the

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[152] See art. VI, which defines the acts of corruption. This same purposive condition is envisaged for a number of crimes grouped under the heading "Progressive Development", in art. XI. See arts. VIII (Transnational Bribery) and IX (Illicit Enrichment).

[153] See art. XVII.

[154] See arts. 2, 3, 4, 5, 6, 9, 10 and 11.

[155] See art. 16.

[156] See *Explanatory Report*, para. 77. The text of the *Explanatory Report* is available at: conventions.coe.int.

[157] See art. 4.

adoption of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), the draft Code of Offences against the Peace and Security of Mankind of 1954 and the draft Code of Crimes against the Peace and Security of Mankind of 1996 are also of interest. Moreover, it may be useful to analyse the Commission's work on the articles on the responsibility of international organizations.

79. The articles on the responsibility of States for internationally wrongful acts[158] are particularly relevant for the purposes of this report. On the assumption that, in order for an act to qualify as an "act performed in an official capacity", there must be an identifiable link between the act and the exercise of State functions or activities, it is clear that the provisions concerning the attribution of an act to the State contained in articles 4 to 11 of the articles must be duly taken into account. They include elements that relate both to the concept of a "State official" and to the concept of an "act performed in an official capacity". As the elements relating to the concept of a "State official" were covered in the third report,[159] this report will focus exclusively on the elements that may be used to define the specific characteristics of the act, which are, essentially, that the act is performed on behalf of the State and in exercise of "elements of the governmental authority"[160] or "legislative, executive, judicial or any other functions".[161]

80. The Commission's commentary to the aforementioned articles is also of interest for determining how an act is attributed to the State and how it may be concluded that a person is acting on behalf of the State. For instance, the introductory commentary to chapter II sets out the general rule that "the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State".[162] Furthermore, what is relevant is not the internal function the agent performs within the State, but rather the fact that he performs "public functions" and exercises "public powers".[163] As the Commission indicates in its commentary to article 7, the central issue is whether "the conduct was performed by the body in an official capacity or not".[164] In the view of the Commission, such conduct includes cases in which the act is performed "in an apparently official capacity, or under the colour of authority".[165]

81. The Commission also took the view that the essential element for attributing conduct to a State is that the official must be acting as an organ or agent of the State, regardless of the particular motivation he or she may have. It should be added that, in accordance with article 7, "the conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions." Thus, even *ultra vires* acts by persons or organs empowered to exercise elements of

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[158] *Report of the International Law Commission on the work of its fifty-third session*, A/56/10, p. 29 ff.

[159] See A/CN.4/673, paras. 106-110.

[160] See art. 5.

[161] See art. 4, para. 1.

[162] Ibid., p. 80, para. (2).

[163] Ibid., p. 82, para. (6).

[164] Ibid., p. 102, para. (7).

[165] *Report of the International Law Commission on the work of its fifty-third session*, A/56/10, p. 91.

the governmental authority are attributable to the State for the purposes of responsibility. However, as indicated by the Commission, "cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State".[166]

82. It should further be recalled that the articles also cover certain types of conduct by persons that are not organs or agents of the State, where, a priori, it is impossible to confirm, or difficult to conclude, that they have exercised elements of the governmental authority. The scenarios envisaged are essentially: (i) the conduct is directed or controlled by the State (article 8), (ii) the conduct is carried out in the absence or default of the official authorities (article 9) and (iii) the conduct is acknowledged and adopted by the State as its own (article 11). In addition, acts performed by insurrectional movements should also be taken into consideration, as they are retroactively attributable to the State under certain circumstances. Ultimately, the articles seek to define as broadly as possible those acts that, directly or indirectly, may be attributed to the State for the purposes of responsibility, in order to prevent States from fraudulently evading responsibility for acts that were unequivocally carried out for their benefit, and, on occasion, even under their control or with their implicit consent.

83. In any event, it should be noted that while the Commission has indicated that, in international law, the main point is that the act performed be regarded as an official "governmental" act, it has not defined that concept. In fact, when considering the scope of such governmental authority, the Commission pointed out in its commentary to article 5 that the term "governmental" is necessarily imprecise. However, in the commentaries to the relevant articles, it gave some isolated examples of what constitutes governmental authority, including the functions of the police,[167] powers of detention and discipline pursuant to a judicial sentence or to prison regulations,[168] or immigration control and quarantine.[169] The lack of a definition of the concept of "governmental authority" may be ascribed to the variety of scenarios that can exist in practice and that necessitate a case-by-case analysis. "Of particular importance will be not just the content of the powers, but the way they are conferred ... the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise".[170] In any case, there is no doubt that the concept of "elements of the governmental authority" must be understood in a broad sense to include the exercise of legislative, judicial and executive prerogatives.

84. In that connection, it should also be recalled that the Commission has stated that "it is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as '*acta jure gestionis*' ... The breach by a

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[166] Idem, p. 102. As the Commission continues to affirm, in the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".

[167] See *Report of the International Law Commission on the work of its fifty-third session*, A/56/10, p. 82, para. (6); p. 94, para. (5); and p. 111, para. (6).

[168] Ibid., pp. 92-93, para. (2).

[169] Ibid.

[170] Ibid., p. 94, para. (6). The Commission stated at that time that "what is regarded as 'governmental' depends on the particular society, its history and traditions".

State of a contract does not as such entail a breach of international law ... But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act".[171]

85. To conclude the analysis of this instrument, it should be noted that the Commission stated, in article 58, that the articles on State responsibility "are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State". The Commission thus accepts the existence of two distinct types of responsibility that may derive from the same act: State responsibility and individual responsibility. That topic is discussed below.[172]

86. While the articles on the responsibility of international organizations do not refer directly to "acts performed in an official capacity" by a "State official", the Commission's work on that topic has raised issues that are relevant to this report. The concepts of "effective control", "on duty" and "discharge of official functions" are of particular interest. The question of "effective control" has arisen, in particular, in the context of peacekeeping operations. In that regard, the Commission has stated that:

> Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect. .... When an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question.[173]

87. In its discussion of the second concept, the International Law Commission refers to the organ or agent that acts "in the performance of functions" given to that organ or agent as it is meaningless to refer to the "exercise of elements of the governmental authority" in this context. The Commission therefore refers in its commentary to "conduct ... linked with ... official functions" or "'on-duty' conduct". In particular, in its commentary to article 8, relating to the attribution of *ultra vires* acts to an organization, it states:

> Practice of international organizations confirms that *ultra vires* conduct of an organ or agent is attributable to the organization when that conduct is linked with the organ's or agent's official functions ... While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization, the "on-duty" conduct may be so attributed. One would then have to examine whether the *ultra vires* conduct in question is related to the functions entrusted to the person concerned.[174]

88. Lastly, it should be recalled that, like the articles on State responsibility, the articles on the responsibility of international organizations contain a "without prejudice" clause concerning individual responsibility (article 66), thereby

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[171] Ibid., p. 87.

[172] See below, paras. 98-101.

[173] See para. (7) of the commentary to art. 7, *Report of the International Law Commission on the work of its sixty-third session*, A/66/10, para. 88.

[174] Ibid. See commentary to art. 8, para. (9).

recognizing the possibility that the same act may give rise to two distinct types of responsibility.[175]

89. In the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[176] the International Law Commission does not address the official nature of the crimes set out therein or their attribution to the State. Instead, its focus is on defining crimes under international law and establishing the international responsibility of individuals who commit such crimes. This does not mean, however, that in so doing the Commission has taken no account of the underlying State component of the crimes thus defined. On the contrary, it may be concluded from an analysis of the Commission's work that the Principles should be interpreted in the light of the acts from which they derive and, in particular, of the London Charter establishing the Nürnberg Tribunal and the judgment handed down by the Tribunal. From that standpoint, the following elements of the set of principles drafted by the Commission and subsequently adopted by the General Assembly should be noted:

(i) The crimes set out in Principle VI (crimes against peace, war crimes and crimes against humanity) are defined in a manner that makes clear the connection between the acts constituting such crimes and the activity of the State.[177]

(ii) The Commission includes among the potential perpetrators of such crimes persons who "acted as Head of State or responsible Government official", and thus as State officials within the meaning of the present topic.[178]

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[175] The wording of art. 66 is almost identical to that of art. 58 of the articles on State responsibility, the only difference being the addition of the phrase "an international organization or".

[176] General Assembly resolution 488 (V), Formulation of the Nürnberg Principles, of 12 December 1950.

[177] Principle VI is worded as follows: "The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:
   (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
   (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:
   Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:
   Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime."

[178] See Principle III. In its commentary to this principle, the Commission emphasizes that reference is being made to a person acting in an official capacity, based on the Nürnberg Tribunal's references to "representatives of a State" and to persons "acting in pursuance of the authority of the State". See *Yearbook of the International Law Commission, 1950*, vol. II (United Nations publication, Sales No. 1957.V.3, Vol. II), *Report of the International Law Commission* (A/1316), paras. 103-104.

> (iii) The Commission also considers the possibility that "a person acted pursuant to order of his Government or of a superior", in which case the crime may also be attributed to the State under the rules of attribution established in the articles on responsibility of States for internationally wrongful acts.[179]

It may thus be concluded that the crimes set out in the Nürnberg Principles may be regarded as "acts performed in an official capacity", at least in some cases, even though the Principles establish the individual responsibility of persons who commit such acts.[180]

90. To conclude the analysis of the work of the International Law Commission, it is necessary to consider the manner in which the Commission dealt with the question of "acts performed in an official capacity" in the 1954 draft Code of Offences against the Peace and Security of Mankind and the 1996 draft Code of Crimes against the Peace and Security of Mankind. In relation to the two drafts, it should first be noted that, as in the case of the Nürnberg Principles, there was no need for the Commission to specify whether a particular crime should be regarded as an "act performed in an official capacity". Meaningful conclusions on this issue can nonetheless be drawn both from the draft Codes themselves and from the Commission's commentary to some of the articles.

91. In the 1954 version of the draft Code, article 2 contains the list of offences against peace and security.[181] Paragraphs (1) to (9) refer to acts that can only be performed by "the authorities of a State", while paragraphs (10) and (11) envisage the possibility that acts may be performed "by the authorities of a State or by private individuals". Nonetheless, as Mr. Doudou Thiam, Special Rapporteur, would later state in relation to such offences (those referred to in paragraphs (10) and (11)),

> "the participation of individuals, which is unimaginable in theory, seems to be impossible in practice. Genocide is the outcome of a systematic large-scale effort to destroy an ethnic, national or religious group. In the modern world, private individuals would find it difficult to carry out such an undertaking single-handed. The same is true, moreover, of all crimes against humanity, which require the mobilization of means of destruction which the perpetrators can obtain only through the exercise of power. Some of these crimes — *apartheid*, for example — can only be the acts of a State. In short, it seems questionable whether individuals can be the principal perpetrators of offences against the peace and security of mankind".[182]

92. The 1996 draft Code, meanwhile, establishes the individual responsibility of persons who commit any of the crimes against the peace and security of mankind included in the following list: aggression (article 16), genocide (article 17), crimes against humanity (article 18), crimes against United Nations and associated personnel (article 19) and war crimes (article 20). While this draft does not

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[179] See Principle IV.

[180] It should be borne in mind that the Nürnberg Tribunal rejected the argument of the defence that the acts of the defendants were solely "acts of the State" that automatically ruled out individual responsibility.

[181] The full text of the draft Code adopted by the Commission at its sixth session, in 1954, is reproduced in *Yearbook of the International Law Commission, 1985*, vol. II, Part Two (United Nations publication, Sales No. E.86.V.5 (Part II)), p. 8.

[182] See A/CN.4/387, para. 13.

introduce any elements regarding the "official" nature of such acts in defining these crimes, it contains several provisions that are germane to the present report:

(i) First, articles 5, 6 and 7 reflect the official nature of such acts by referring, respectively, to the order of a Government or a superior, the responsibility of the superior, and the fact that the official position of an individual who commits a crime is irrelevant to the determination of responsibility.

(ii) Second, article 2, paragraph 2, in conjunction with article 16, establishes that the crime of aggression can be committed only by individuals who are agents of the State and who use their power to give orders and the means it makes available in order to commit this crime.[183] The other forms of criminal conduct, however, may in principle be committed either by private individuals or by agents of the State, in a broad sense.

(iii) The definition of crimes against humanity requires that the acts in question be committed in a systematic manner or on a large scale "and instigated or directed by a Government or by any organization or group".

93. Both the Special Rapporteur and the Commission point out that even though these crimes may be committed by individuals considered in their personal capacity, in practice they require the participation of persons invested with official status. It may be recalled, for example, that the Commission, in its commentary to article 5, states that "[c]rimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command".[184] Also significant is the position taken by Mr. Doudou Thiam, Special Rapporteur, who, in his third report, affirms that offences jeopardizing the independence, safety or territorial integrity of a State "involve means whose magnitude is such that they can be applied only by State entities. Moreover, it is difficult to see how aggression, the annexation of a territory or colonial domination could be the acts of private individuals. These offences can be committed only by individuals invested with a power of *command*, in other words the *authorities* of a *State*, people of high rank in a political, administrative or military hierarchy who give or receive orders, who execute government decisions or have them executed. These are *individual-organs*, and the offences they commit are often analysed in terms of abuse of sovereignty or misuse of power. Consequently, individuals cannot be the perpetrators of these offences".[185]

94. Also of relevance, lastly, is article 4, entitled "Responsibility of States", which provides that "[t]he fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law". This article thus reiterates the principle that a single act may entail dual responsibility, as mentioned previously in the present report. As the Commission notes in its commentary to this article, "it is possible, indeed likely, ... that an individual may commit a crime against the peace and security of mankind as an 'agent of the State', 'on behalf of the State', 'in the name of the State' or even in a

[183] A/51/10, commentary to art. 2, para. (5). See also commentary to art. 16.

[184] Ibid., commentary to art. 5, para. (1).

[185] See A/CN.4/387, para. 12.

de facto relationship with the State, without being vested with any legal power".[186] This statement should moreover be read in conjunction with the Commission's commentary to article 2, in which, while recognizing that the scope of application of the Code *ratione personae* is limited to natural persons, it categorically affirms that "[i]t is true that the act for which an individual is responsible might also be attributable to a State if the individual acted as an 'agent of the State', 'on behalf of the State', 'in the name of the State' or as a de facto agent, without any legal power".[187]

4. Characteristics of an "act performed in an official capacity"

95. On the basis of the foregoing analysis, it may be concluded that the following are characteristics of an "act performed in an official capacity":

(i) The act is of a criminal nature;

(ii) The act is performed on behalf of the State;

(iii) The act involves the exercise of sovereignty and elements of the governmental authority.

Each of these characteristics is analysed below.

(i) Criminal nature of the act

96. In defining the scope of application of this topic, the International Law Commission has already specified that it refers to immunity from criminal jurisdiction. Draft articles 3 and 5, provisionally adopted by the Commission, expressly provide that State officials "enjoy immunity ... from the exercise of foreign criminal jurisdiction". The acts performed in an official capacity to which the present report refers must, therefore, be of a criminal nature. This means that they have certain characteristics that must be analysed in order to determine whether they have any significance for the purposes of the present report.

97. The chief characteristic of a criminal act is its highly personal nature and the existence of a direct link between the act and the person by whom it was committed. The responsibility entailed by the act is thus, by definition, of an individual nature and attributable to the person who committed the act, with no possibility of substituting the responsibility of a third party for that of the person in question. This is true even if a separate (independent or subsidiary) legal obligation can be imposed on a third party in respect of the same act. Such an obligation would derive from, but cannot be confused with, the primary criminal responsibility. It is for this reason that the attribution to the State of criminal acts committed by its officials is significantly limited and can only be understood as a legal fiction grounded in the

[186] A/51/10, p. 30.

[187] Ibid., p. 20. The relationship between the individual responsibility of the person who directly commits an act and the potential responsibility of the State had already been highlighted years earlier. For example, the March 1983 analytical paper prepared pursuant to the request contained in paragraph 256 of the report of the Commission on the work of its thirty-fourth session (A/CN.4/365, in particular paras. 117-125) reflects the view of a number of State representatives, who, while emphasizing the principle of individual responsibility, felt that the question of State responsibility should not be overlooked. Some representatives even suggested that the future text should include an express provision that the assertion of individual criminal responsibility shall not affect the international responsibility of States.

traditional model of attributing acts to the State for the purposes of ascribing responsibility for internationally wrongful acts. Nevertheless, any criminal act covered by immunity *ratione materiae* is not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed.

98. The initial consequence of the criminal nature of the act is thus the possibility that the act may entail two different types of responsibility. The first, of a criminal nature, attaches to the individual who committed the act. The second, of a civil nature, attaches either to the individual who committed the act or to a third party. In the context of the present study, this means that an act performed by a State official may give rise both to criminal responsibility, which is attributable solely to the official himself or herself, and to a subsidiary civil responsibility attributable to both the official and the State.[188] This model of the relationship between an act and the responsibility arising from it appeared in international law relatively recently, and became consolidated on the basis of the definition of the principle of individual criminal responsibility that emerged after the Second World War, and especially the institutionalization of international criminal law over the last decade of the twentieth century. This phenomenon is not, however, alien to internal law. On the contrary, the legal practice analysed in the present report shows how the same acts have given rise to various claims, sometimes directed against the State and sometimes against the individual, that have been made under both criminal and civil jurisdiction.

99. This model, which may be termed "single act, dual responsibility", has been expressly recognized by the International Law Commission in several of its texts, in particular article 4 of the draft Code of Crimes against the Peace and Security of Mankind,[189] article 58 of the articles on responsibility of States for internationally wrongful acts,[190] and article 66 of the articles on the responsibility of international organizations.[191] The way in which this model operates is described by the Commission in the commentaries reproduced below:

> (i) "The 'without prejudice' clause contained in article 4 [of the draft Code of Crimes against the Peace and Security of Mankind] indicates that the Code is without prejudice to any question of the responsibility of a State under international law for a crime committed by one of its agents. As the Commission already emphasized in the commentary to article 19 of the draft on State responsibility, the punishment of individuals who are organs of the State 'certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts

[188] In this regard, see J. Foakes, op. cit., pp. 150-141; R. Van Alebeek, op. cit., pp. 103 ff.; Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press, 2012), p. 427.

[189] Article 4 reads as follows: "*Responsibility of States*. The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law".

[190] Article 58 reads as follows: "*Individual responsibility*. These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State".

[191] Article 66 is identical to article 58 of the articles on responsibility of States for internationally wrongful acts, with the sole exception of an express reference to international organizations: "*Individual responsibility*. These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State".

which are attributed to it in such cases by reason of the conduct of its organs'. The State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime".[192]

(ii) "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out. Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.' The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law".[193]

(iii) "(...) the fact that the conduct of an individual is attributed to an international organization or a State does not exempt that individual from the international criminal responsibility that he or she may incur for his or her conduct. On the other hand, when an internationally wrongful act of an international organization or a State is committed, the international responsibility of individuals that have been instrumental to the wrongful act cannot be taken as implied. However, in certain cases the international criminal responsibility of some individuals may arise, for instance when they have been instrumental to the serious breach of an obligation under a peremptory norm in the circumstances envisaged in article 41".[194]

100. The International Court of Justice also recognized the dual responsibility that may arise from an act of genocide in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*. In that case, the Court held that the same conduct could give rise to two different types of responsibility, established through legal procedures that are likewise different.[195] This duality of effects is expressed in the Court's observation that

[192] *Yearbook of the International Law Commission, 1996*, vol. II, Part Two (United Nations publication, Sales No. E.98.V.9 (Part 2)), p. 23, commentary to art. 4, para. (2).

[193] *Yearbook of the International Law Commission, 2001*, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)), pp. 142-143, commentary to art. 58, para. (3). See also para. (2).

[194] A/66/10, chap. V (E), commentary to art. 66, para. (2).

[195] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, paras. 180-182.

> "if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed".[196]

In any event, it should be noted that the Court takes this argument to its ultimate conclusion by finding, in its judgment, that Serbia and Montenegro is not responsible for committing or conspiring to commit genocide, but is responsible for failing to meet its obligation to prevent and punish the crime of genocide in the case of the Srebrenica massacre. This recognition of dual responsibility is moreover linked in the judgment to the test for determining the attributability of an act to the State, an issue that will be explored further in the present report.

101. The considerations described above illustrate how the principle that any act committed by an official is automatically an act of the State and engages only the responsibility of the State cannot be applied presumptively when the act is of a criminal nature. On the contrary, the "single act, dual responsibility" model gives rise to several alternatives, which may be described as follows:

(i) Exclusive responsibility of the State in cases where the act is not attributable to the person by whom it was committed;

(ii) Responsibility of the State and the individual when the act is attributable to both;

(iii) Exclusive responsibility of the individual when the act is solely attributable to such individual, even though he or she acted as a State official.

102. The criminal nature of the act and the duality of responsibility that it may entail also have consequences with respect to immunity, especially in relation to the existing model defining the relationship between the immunity *ratione materiae* enjoyed by State officials and the immunity of the State *stricto sensu*. It should be borne in mind that the immunity of State officials from jurisdiction has traditionally been viewed as a form of State immunity and has been conflated with that concept. It is not unusual to find references, in legal practice, to the idea that State officials enjoy the same immunity enjoyed by the State.[197] This view has led to the conclusion that the immunity of State officials from jurisdiction is not an individual immunity, as it derives from State immunity, the legal regime of which is fully applicable. This conclusion is the outcome of various arguments, including the following: (i) the immunity from jurisdiction enjoyed by State officials is a consequence of the principle of the sovereign equality of States, as expressed by the phrase *par in parem non habet imperium*; (ii) immunity is recognized in order to protect State sovereignty and ensure that international relations can be carried on peacefully and sustainably; (iii) the immunity of State officials is not in fact immunity of the officials but immunity of the State, as demonstrated by the State's freedom of choice with regard to such immunity, including the freedom to lift or waive it; and (iv) bringing suit against a State official in a foreign court is an indirect way of bringing suit against the State when the latter cannot be prosecuted

[196] Ibid., para. 180. This same observation was made by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, judgment of 3 February 2015.

[197] See, for example, *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal (1997) 111 ILR 611; *Jones* v. *Saudi Arabia*, UKHL [2006] 2 WLR 1424; and *Chuidian* v. *Philippine National Bank*, United States Court of Appeals, Ninth Circuit, 912 F. 2d 1095 (1990), 92 ILR 480.

in the courts of a third State, meaning that the official's immunity from jurisdiction serves as a safeguard against frivolous challenges to State immunity, and is therefore equivalent to State immunity.[198]

103. These arguments certainly contain valid points that cannot be denied, especially the fact that officials are given immunity from jurisdiction in the interest of the State and in order to safeguard values and principles that pertain solely and exclusively to the State. Even so, the arguments fail to consider other factors that must be taken into account in order to determine how the immunity of State officials from foreign criminal jurisdiction is related to the immunity of the State, or, in other words, to answer the question, as vividly put by one author, "[w]hich came first — the chicken or the egg? State immunity as a consequence of functional immunity rather than functional immunity as a corollary of State immunity".[199]

104. In order to find an adequate response, it is necessary to consider, once again, the criminal nature of the act, which has two major consequences: (i) the object to which the jurisdictional claims in such cases directly relate is the individual, and (ii) any consequences of the outcome of the criminal proceedings are individual and strictly personal. This creates a direct link between the individual and immunity from foreign criminal jurisdiction, which the Commission took into account in deciding to include an express definition of the concept of a "State official" in the draft articles, and even to use the term "individual" in the definition of a "State official" to indicate that such immunity applies to a natural person.[200] It should also be noted that a State can never be prosecuted in national criminal courts, as any responsibility it may have for criminal acts committed by its officials will always be of a civil nature and can only be determined in civil court by means of a claim for compensation for the harm caused by such acts.[201] This implies a distinction between immunity from civil jurisdiction and immunity from criminal jurisdiction, which must be duly taken into account.

105. In the Special Rapporteur's view, it may be concluded, from the two elements mentioned above, that the immunity of State officials from foreign criminal jurisdiction *ratione materiae* is individual in nature and distinct from the immunity of the State *stricto sensu*. This is true even though this distinction is not always made with sufficient clarity in the literature and in practice, largely as a result of the traditional emphasis on the State (and its rights and interests) as the beneficiary of the protection afforded by immunity. While the State undeniably occupies a central position in this institution, the protection of its rights and interests is nevertheless an insufficient reason to conclude that the immunity of the State and the immunity of its officials are one and the same, just as identity of purpose, as in the case of State immunity and diplomatic immunity, does not mean that the two types of immunity are identical.[202] Rather, in order to gain a proper understanding of the institution of immunity of State officials from foreign criminal jurisdiction *ratione materiae*, it is

[198] For an analysis of these arguments, see, inter alia, J. Foakes, op. cit., pp. 137-139.

[199] R. Van Alebeek, op. cit., p. 105.

[200] See paras. (1) and (4) of the commentary to draft article 2 (e) (A/69/10, para. 132).

[201] See, in this regard, J. Bröhmer, op. cit., pp. 29 and 45; J. Foakes, op. cit., pp. 140-141; H. Fox and P. Webb, op. cit., p. 555; R. Van Alebeek, op. cit., pp. 103 ff.; and Xiodong Yang, op. cit., p. 427.

[202] See, for example, M.G. Kohen, "La distinction entre l'immunité des Etats et l'immunité diplomatique", in *La pratique des Etats concernant les immunités de l'Etat*, G. Hafner, M. Kohen and S. Breau, eds. (Council of Europe/Martinus Nijhoff, 2006), p. 48.

necessary to distinguish between the direct beneficiary of the immunity (the State official) and the indirect or ultimate beneficiary (the State). Immunity *ratione materiae* is recognized in the interest of the State, which has sovereignty, but it directly benefits the official when he or she acts in expression of such sovereignty.

106. The distinction between the immunity of the State and the immunity of its officials from foreign criminal jurisdiction is not a mere theoretical construct; it has been reflected in a number of judicial decisions adopted by both national and international courts. Regarding decisions at the national level, it suffices to recall the different ways in which the House of Lords dealt with immunity in *Pinochet (No. 3)*, *Prince Nasser* and *Jones*, based on the different nature (criminal and civil, respectively) of the proceedings in which immunity was invoked and on the consequences of that difference in terms of immunity. Of particular relevance is *Samantar* v. *Yousuf*, in which the Supreme Court of the United States held that a State official cannot be deemed to be included in the concept of a "State" within the meaning of the Foreign Sovereign Immunities Act and that the immunity of such an official is subject to rules that differ from those applicable to the immunity of a State from prosecution in that country's courts.[203]

107. Of greatest relevance are the decisions of international courts that have expressed or implied a distinction between State immunity and the immunity of State officials. The International Court of Justice, in *Jurisdictional Immunities of the State*, acknowledged this distinction by affirming that:

> "(...) [t]he Court must emphasize that [in the judgment] it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case".[204]

The Court also expressed acceptance of the distinction between the immunity of the State and the immunity of its officials in referring to the way in which national and international courts have dealt with the distinction between civil and criminal jurisdiction and its consequences for immunity,[205] and in referring to its own jurisprudence.[206]

108. The judgement handed down by the European Court of Human Rights in *Jones and Others* v. *the United Kingdom* is highly relevant, since, as the Court notes, the application refers to a case of immunity which, unlike the one in *Al-Adsani*, was

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[203] *Samantar* v. *Yousuf*, United States 130 S. Ct. 2278 (2010). *Samantar* v. *Yousuf* is of particular importance because United States courts had previously upheld the applicability of the Foreign Sovereign Immunities Act to officials of foreign States, thereby conflating the two types of immunity. In relation to the position held previously by such courts, see *Chuidian* v. *Philippine National Bank*, United States Court of Appeals, Ninth Circuit, 912 F. 2d 1095 (1990), 92 ILR 480.

[204] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, para. 91. It should be borne in mind that the Court makes this statement after concluding that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict". See also the separate opinion of Judge Bennouna (para. 35) and the dissenting opinion of Judge Yusuf (para. 40).

[205] Ibid., paras. 87 ff.

[206] Ibid., para. 100.

brought before the British courts against individuals and not against a foreign State. The Court nonetheless applied the traditional doctrine that State immunity applies also to individuals.[207] This conclusion, however, requires a nuanced view, as the Court makes clear, in explaining the legal grounds for its judgement, that its decision refers exclusively to immunity in the context of civil cases, and alludes to the possibility that a different approach may be taken when immunity is invoked in criminal cases.[208]

109. This differentiation between the immunity of State officials from foreign criminal jurisdiction and the immunity of the State *stricto sensu* is still more evident in the case of immunity *ratione personae*, as an official who enjoys such immunity (a Head of State, Head of Government or Minister for Foreign Affairs) may do so even in respect of acts which are performed in a private capacity and which thus are not attributable to the State and do not engage its responsibility. In such cases, the immunity of these three officials from foreign criminal jurisdiction for a criminal act committed in a private capacity has no equivalent whatsoever in the realm of State immunity. And yet, even in these cases, such acts are covered by a form of immunity from foreign criminal jurisdiction that is recognized for the benefit of the State, not of its official.

110. The following conclusions may be drawn on the basis of the foregoing considerations:

(i) State immunity is typically assumed to apply in respect of acts which are attributable to the State alone and for which the State alone can be held responsible.

(ii) When an act is attributable both to the State and to an individual, and both can be held responsible, two types of immunity can be distinguished: immunity of the State, on the one hand, and immunity of the official, on the other.

(iii) The differentiation between immunity of the State and immunity of State officials is clearest in respect of the immunity of State officials from foreign criminal jurisdiction, given the different types of responsibility attaching to the State (civil) and its official (criminal) and the different nature of the jurisdictions from which immunity is invoked.

(ii) Attribution of the act to the State

111. The exercise of immunity *ratione materiae* is justified only when a link exists between the State and the act carried out by a State official; it is this link that qualifies the act as one performed on behalf of the State. Accordingly, in order to conclude that such a link exists, the act must first be attributable to the State. Given that the attribution must follow the rules of international law, the rules of attribution contained in articles 4 to 11 of the articles on responsibility of States for internationally wrongful acts, which have been discussed above, take on special significance. However, it should be recalled that the aforementioned criteria for attribution were defined by the Commission in the context of international responsibility, with a clear purpose: to prevent the State from using indirect forms of

[207] See *Jones and Others* v. *the United Kingdom*, paras. 200 and 202-204.

[208] Ibid., paras. 207 and 212-214. The Court expressed the same view in *Al Adsani* (para. 65). See note 48 above.

action, or individuals who are not its organs and who have not been expressly empowered to exercise elements of the governmental authority, in order to fraudulently free itself from international responsibility arising from acts committed on its behalf, under its instruction, control or direction, or under circumstances that render them acts of the State because they were carried out for the benefit or in the interest of the State.[209] Therefore, all of the criteria contained in chapter II of the articles on State responsibility should be analysed to determine whether they support the conclusion that an act attributable to a State is an "act performed in an official capacity" for the purposes of immunity of State officials from foreign criminal jurisdiction.

112. In this respect, the criminal nature of the acts to which the criteria for attribution are to be applied, as well as the nature of immunity, which itself constitutes an exception to the general rule on the exercise of jurisdiction by the forum State, should be taken into account. Both of these elements require an interpretation of the criteria for attribution which ensures that the institution of immunity does not become a mechanism to evade responsibility, thus altering its very nature.[210] In that light, it is questionable whether all the criteria for attribution contained in the articles on responsibility of States for internationally wrongful acts are useful for the purposes of immunity. Particularly unsuitable are the criteria set out in articles 7, 8, 9, 10 and 11, which are analysed below.

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[209] See the general commentary on chapter II of the draft articles, in particular paras. (4) and (9). *Yearbook of the International Law Commission, 2001*, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)).

[210] It should also be noted that when the International Court of Justice itself has applied those criteria for attribution, it has always done so using a restrictive approach. In that regard, the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (ICJ, judgment of 26 February 2007) and the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (ICJ, judgment of 3 February 2015) are particularly significant, since in both cases, the responsibility of the State is determined in relation to conduct that has an unequivocally criminal component: genocide. In both cases, the International Court of Justice interpreted the criteria for attribution in a narrow and restrictive manner, distinguishing between acts committed by individuals acting on the basis of the existence of a formal link between themselves and the State and acts committed by persons who did not have such a link to the State, but which nevertheless could be attributed to the State. While the Court concluded that, in the first scenario, the attribution of the act to the State was automatic and did not require any particular proof, it asserted that, in the second scenario, it was not possible to attribute the act to the State unless it exercised direct control over the individuals in question. The Court also interpreted this last form of attribution in narrow terms, affirming that it constitutes an extraordinary scenario. In addition, it is interesting to note that in situations where persons commit acts at the instigation of, or under orders or instructions of, the State, the Court has concluded that the responsibility which the State may incur as a result of such acts is not equivalent to any characterization of the same as acts of the State *stricto sensu*. On the contrary, in such situations, the responsibility of the State derives from its own acts, namely, the instructions or orders in violation of international law that have been issued by its own organs or by persons legally empowered to exercise elements of the governmental authority. State responsibility may also derive from the failure to adopt the prevention and punishment measures called for in the Genocide Convention. Lastly, it should be noted that the Court carried out a rigorous and restrictive analysis of the existence of a link between the State and the individuals and organizations who committed acts of genocide. See, in particular, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, paras. 385-389, 392-397, 406, 412, 438 and 449.

113. The criterion contained in article 7 addresses the general issue of *ultra vires* acts and acts performed by the official with specific motives, which the International Law Commission declared to be irrelevant for the purpose of determining State responsibility. However, the official's motives and the *ultra vires* nature of his or her acts may be significant in the context of immunity. Suffice it to note at this point that the judicial practice discussed above reveals that, in a number of cases, national courts have taken into account the perpetrators' motives when characterizing their acts as private acts not covered by immunity. Similarly, on several occasions, the courts have referred to non-fulfilment of the official's mandate or conduct in excess of authority to conclude that he or she has acted in a manner that precluded the enjoyment of immunity. In all of these cases, it is clear that the officials acted for their own benefit or in a manner that was inconsistent with or exceeded the mandate that the State had conferred on them, and the attribution of their acts to the State for the purposes of immunity cannot be justified. However, it should be noted that while the motive of self-interest has in all cases been interpreted as a reason not to characterize an official's act as an act performed on behalf of the State, jurisprudence is less coherent with regard to *ultra vires* acts.

114. The criteria for attribution contained in articles 8 and 9 raise, in a general way, the phenomenon of "de facto officials". In the case of article 8, the Commission has stated that "most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State,"[211] especially bearing in mind the distinction made by the International Court of Justice between individuals acting under the direct control of the State and those simply acting at the instigation and under instructions of the State. The conclusion reached by the Court in the *Genocide* case *(Bosnia and Herzegovina* v. *Serbia and Montenegro)* with regard to responsibility[212] appears to be equally applicable in respect of immunity; this would mean that only acts carried out by an individual acting under the direct control of the State could be regarded as acts attributable to the State for the purposes of immunity. The concept of a State official is thus defined more accurately, excluding those individuals who are usually regarded as de facto officials. Only this conclusion is consistent with the nature of immunity, as it seems unreasonable that the State could claim immunity for individuals to whom it had not voluntarily conferred the status of organ or person authorized to exercise elements of the governmental authority, or with whom it had not established a special link of dependence and effective control at the time of commission of the acts that constitute the material element with regard to immunity.

115. With regard to the criterion contained in article 9, a more nuanced analysis is needed to assess its applicability for the purposes of immunity. In this case, the articles provide for a de facto situation in which the official authorities have disappeared or are being gradually restored. As stated by the Commission, that would be a form of "agency of necessity".[213] The cumulative conditions that the Commission requires for attribution in this case (the conduct must effectively relate to the exercise of elements of the governmental authority, the conduct must have been carried out in the absence or default of the official authorities, and the circumstances must have been such as to call for the exercise of those elements of

[211] Idem, p. 47.
[212] See footnote 210 above.
[213] Idem, p. 49.

authority) would generate a situation that closely resembles the performance of public functions. As stated by the Commission, the verb "call for" refers to the logic of need: the circumstances necessitated "some exercise of governmental functions". There is also a normative element in the form of agency entailed by article 9 which distinguishes these situations from the general rule that conduct of private parties, including insurrectionary forces, is not attributable to the State.[214] Thus, on an exceptional basis such acts could possibly be characterized as having been performed in an official capacity for the purposes of the immunity *ratione materiae* discussed in the present report. However, the very special circumstances under which such acts would be carried out make it highly unlikely that the said acts would result in a claim of immunity. Indeed, in the practice discussed above, there are no cases to which this scenario applies.

116. Third, in the case of retroactive attribution to the State of acts performed by insurrectional movements that assume power (article 10), it should be noted that the individuals who performed such acts did not hold the status of State officials at the time they carried out the said activities. It is therefore difficult to conclude that an act which, when it originated, could not under any circumstance be considered an "act performed in an official capacity" could retroactively acquire such status, and that immunity from jurisdiction *ratione materiae* could be generated a posteriori, when it was not applicable to the act at the time it occurred. This is all the more true when the acts in question were conducted in the context of confrontations, including armed confrontations, with the authorities that, at the time, were undoubtedly acting on behalf of the State. As in the previous case, practice offers no examples of cases in which immunity from foreign criminal jurisdiction *ratione materiae* has been invoked in respect of acts carried out by insurrectional movements. Therefore, it may be concluded that such acts as may occur in the context of the activities envisaged under article 10 of the articles on responsibility of States for internationally wrongful acts cannot be regarded as "acts performed in an official capacity" in relation to the present topic.

117. Lastly, article 11 provides for the attribution of an act to a State if the State freely acknowledges the act as its own, without it being necessary for any type of prior link to exist between the act and the State. This criterion for attribution is fully justified for the purposes of determining State responsibility, but it is incompatible with the nature of immunity *ratione materiae*, which requires the acts covered by such immunity to have been performed in an official capacity at the time of commission. To deem this criterion for attribution applicable for the purposes of immunity would be equivalent to endowing the State with the right to declare, unilaterally and without any limit, that any act carried out by any person, irrespective of when the act was committed, could benefit from the immunity of State officials from foreign criminal jurisdiction. That is without a doubt incompatible with the very nature of immunity and with the foundation and objectives of the institution. It may therefore be concluded that this criterion for attribution is not relevant for the purpose of characterizing an act as having been performed in an official capacity for the purposes of this topic.

[214] Idem, p. 49.

(iii) Sovereignty and exercise of elements of the governmental authority

118. As noted above, the attribution of an act to a State is the prerequisite for that act to be considered an "act performed in an official capacity" for the purposes of immunity from foreign criminal jurisdiction *ratione materiae*. However, the fulfilment of that requirement, even on the basis of the restrictive interpretation advocated above, is not enough to give rise to such characterization. On the contrary, characterizing an act which has been attributed to the State as an "act performed in an official capacity" requires the application of an additional, teleological criterion. Since immunity *ratione materiae* is intended to ensure respect for the principle of the sovereign equality of States, embodied in the maxim *par in parem non habet imperium*, the acts covered by such immunity must also have a link to the sovereignty that, ultimately, is intended to be safeguarded. That link, which cannot be merely formal, is reflected in the requirement that the act performed in an official capacity cannot be only an act attributable to the State and performed on behalf of the State, but must also be a manifestation of sovereignty, constituting a form of exercise of elements of the governmental authority. Furthermore, this requirement reflects the distinction between State responsibility and immunity, which precludes the automatic application of all of the criteria and legal categories defined for the purposes of the former to the latter.[215]

119. However, the concept of sovereignty remains difficult to define. Furthermore, it is not easy to describe what is meant by the "exercise of elements of the governmental authority", as evidenced by the fact that the International Law Commission has not provided a definition of that term, nor is it defined in case law or in the legal literature. That being said, a series of elements leading to an approximation of the concept can be inferred from the analysis of practice set out above. Drawing on both the previous work of the Commission[216] and the judicial decisions taken by a number of national courts,[217] it may be concluded that the definition of "exercise of elements of the governmental authority" should be based on two elements, namely: (i) certain activities which, by their nature, are considered to be expressions of or inherent to sovereignty (police, administration of justice, activities of the armed forces, foreign affairs); and (ii) certain activities occurring during the implementation of State policies and decisions that involve the exercise of sovereignty and are therefore linked to sovereignty in functional terms. These positive criteria are complemented by a negative criterion, which is just as important: national courts have expressly excluded from the scope of immunity those acts in which private interest and motives override the interest and motives of the State, even when the acts in question conducted by the official had a semblance of official status.[218] Such criteria should be applied, logically and on a case-by-case basis, so as to take into account all the elements that come together when a given act is performed and need to be assessed in order to determine whether, on the basis of its nature or its function, it constitutes an act in the exercise of elements of

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[215] For a view against this argument, see R. O'Keefe: *International Criminal Law*, Oxford University Press, 2015, in particular para. 10.60. The Special Rapporteur is grateful to the author for sending a draft version of chapter 10 of his work, which she has used for the preparation of the present report. O'Keefe follows the reasoning set out by the former Special Rapporteur, Mr. Kolodkin (see A/CN.4/631, para. 24).

[216] See para. 83 above.

[217] See para. 54 above.

[218] See para. 58 above.

governmental authority and an expression of sovereignty. This case-by-case and context-based approach has also been employed by the courts whose decisions have been analysed in the present report.

120. The aforementioned criteria, which are based on practice, offer some guidance to the courts responsible for ruling on immunity. It should also be noted that national courts have in a number of cases referred to the distinction between *acta jure imperii* and *acta jure gestionis* to support their reasoning.[219] In this respect, it must be recalled that those two categories were established in the context of State immunity to serve as elements for analysis in relation to the restrictive theory of State immunity. The emphasis placed on the public and private or commercial dimension that characterizes each of these categories therefore makes it very difficult to automatically apply that distinction in order to identify "acts performed in an official capacity" for the purposes of immunity of State officials from foreign criminal jurisdiction. Nevertheless, the legal constructs that have gradually developed in respect of the basic characteristics of *acta jure imperii* offer some useful elements that may be taken into account by legal actors in the context of characterizing an act for the purposes of the present report.

121. The application of these criteria poses a special challenge in the case of international crimes. As demonstrated in the analysis of judicial practice, courts have not adopted a consistent position with regard to the definition of "acts performed in an official capacity" for the purposes of immunity.[220] In some decisions, it has been argued that international crimes cannot under any circumstances be regarded as "acts performed in an official capacity" or benefit from immunity. The opposing view holds that international crimes are acts performed in an official capacity and are therefore covered by immunity. An intermediate position is that, while international crimes have been viewed as acts performed in an official capacity, they cannot, by their nature, be regarded as benefiting from immunity. Lastly, in some cases it has been argued that international crimes cannot benefit from immunity without some pronouncement being made as to whether or not they are acts performed in an official capacity. The literature reflects the same divergences in interpretation.[221] The Commission's work will therefore need to address the issue of the relationship between immunity and international crimes. At this stage, that relationship will be discussed solely from the perspective of the definition of acts performed in an official capacity.

122. According to the first position mentioned above, international crimes cannot be regarded as a manifestation of sovereignty or a form of exercise of elements of the governmental authority and must therefore be excluded from the concept of "acts performed in an official capacity" for the purposes of immunity. Various lines of reasoning are put forward in favour of this interpretation, but they can be summed up in two basic arguments, which are sometimes formulated jointly: (i) the commission of international crimes is not a function of the State; and (ii) international crimes constitute forms of conduct prohibited under international law and undermine the core values and principles of that system. In both cases, international crimes are viewed from the perspective of the limits to immunity: such

[219] See para. 54 above.

[220] See paras. 56 and 57 above.

[221] On international crimes, see R. Pedretti: *Immunity of Heads of State and State Officials for International Crimes*, Brill/Nijhoff, 2015.

crimes are forms of conduct that cannot be regarded as having been performed in an official capacity and immunity therefore does not apply to such crimes because they do not present the characteristics that define the material element of immunity *ratione materiae*. That position is often presented together with a reflection on the need to consolidate and strengthen the fight against impunity, as one of the distinctive features of international law at the beginning of the twenty-first century.

123. These arguments are certainly thought-provoking and have the attractive quality of defending the values and principles that underpin society and international law in our time. However, there are two major problems associated with this understanding of international crimes as a limit on immunity *ratione materiae*. The first relates to the very concept of acts performed in an official capacity for the purposes of immunity. The second challenge is broader in scope and concerns the consequences the approach could have with regard to State responsibility for international crimes.

124. The conclusion that an international crime cannot be regarded as an act performed in an official capacity is based on the assumption that such crimes cannot be committed in exercise of elements of the governmental authority or as an expression of sovereignty and State policies. However, the argument that torture, enforced disappearances, extrajudicial killings, ethnic cleansing, genocide, crimes against humanity and war crimes are devoid of any official or functional dimension in relation to the State is at odds with the facts. Indeed, as has been highlighted on many occasions, including in the work of the International Law Commission, such crimes are committed using the State apparatus, with the support of the State, and to achieve political goals that, regardless of their morality, are those of the State. Such crimes are on many occasions committed by "State officials", within the meaning given to this term for the purposes of the topic under consideration. Furthermore, the participation of State officials is an essential element of the definition of some forms of conduct characterized as international crimes under contemporary international law. In addition, the argument that international crime is contrary to international law does not provide any additional element of relevance for the characterization of an act performed in an official capacity, given that, as noted above, the criminal nature of the act, and consequently, its illegality, is one of the characteristics of any act performed in an official capacity in respect of which immunity from foreign criminal jurisdiction may be invoked, regardless of whether it is determined to be illegal by virtue of national or international law.

125. The second of the two problems mentioned above is no less significant. For a full understanding of this issue, consideration must be given to the fact that, in order for an act to be characterized as having been performed in an official capacity for the purposes of immunity, the act must necessarily be attributable to the State. Therefore, the assertion that an international crime cannot be considered as having been performed in an official capacity could perversely, and doubtless unintentionally, give rise to an understanding of international crimes as acts that are not attributable to the State and can only be attributed to the perpetrator. The potential major consequences of this assertion with regard to responsibility require little explanation: if the act is not attributable to the State, the State would be exempted from any international responsibility in relation to that act, and instead of international responsibility being attributed to the State, criminal responsibility would be attributed to the individual. That conclusion is incompatible with the very nature of immunity and with the latest developments in international law in the area

of responsibility, one of the distinctive features of which has been the adoption of the model of dual responsibility (State and individual).[222] Thus, it cannot be concluded from this perspective either that international crimes are not acts performed in an official capacity for the purposes of immunity.

126. Yet the characterization of international crimes as "acts performed in an official capacity" does not mean that a State official can automatically benefit from immunity *ratione materiae* for the commission of such crimes. On the contrary, given the nature of those crimes and the particular gravity accorded to them under contemporary international law, there is an obligation for them to be taken into account for the purposes of defining the scope of immunity from foreign criminal jurisdiction. However, an analysis of the effects of international crimes in respect of immunity could be explored more fully in the context of exceptions to immunity. That is the approach the Special Rapporteur proposes to take in her fifth report.

5. Conclusion: the definition of an "act performed in an official capacity"

127. On the basis of the analysis set out in the preceding pages, the following draft article is proposed:

Draft article 2
Definitions

For the purposes of the present draft articles:

(f) An "act performed in an official capacity" means an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction.

C. The temporal element

128. The temporal element of immunity *ratione materiae* is not disputed in either practice or doctrine; there is a broad consensus on the indefinite nature of this type of immunity. The term "indefinite nature" refers to the fact that immunity *ratione materiae* can be applied at any time after the commission of the act, whether the official concerned remains in office or has left office.

129. In order to understand the real meaning of the temporal element of immunity *ratione materiae*, a distinction must be made between two points in time: the moment when the act that could give rise to immunity is committed and the moment when immunity is invoked. While the first must have taken place during the term of office of the State official, the second will occur when criminal proceedings are initiated against the perpetrator of the act, irrespective of whether immunity is invoked during the official's term of office or after it has ended. Therefore, the temporal element of immunity *ratione materiae* is more conditional in nature than it is limited: if the condition is met at a given time, there is no time limit whatsoever for the applicability of immunity. This is substantiated by the very nature of this type of immunity and the primacy in the same of the concept of an "act performed in an official capacity", the nature of which does not change or disappear when the official leaves office.

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[222] See paras. 96-110 above.

130. This understanding of the temporal element of immunity *ratione materiae* thus differs from that of the temporal element of immunity *ratione personae*, which is by nature limited. As established in draft article 4, paragraph 1, which was provisionally adopted by the Commission, immunity *ratione personae* ends when the Head of State, Head of Government or Minister for Foreign Affairs completes his or her term of office. Such immunity cannot be invoked subsequently, as the individual concerned must be in office in order to benefit from it.

131. However, this conceptual distinction between the temporal element of immunity *ratione personae* and that of immunity *ratione materiae* does not mean that the two types of immunity are mutually exclusive. On the contrary, immunity *ratione materiae* can be applied to any State official, and therefore, former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, after they have left office, will be able to benefit from immunity *ratione materiae*, even though they are no longer covered by immunity *ratione personae*. In that case, former Heads of State, former Heads of Government and former Ministers for Foreign Affairs will be subject to the general regime applicable to immunity *ratione materiae* and the temporal element will also function as a condition in their regard, since it will be necessary to demonstrate that any act performed by them in respect of which immunity is being invoked can be characterized as an act performed in an official capacity and that it was committed during the period in which they held the relevant position in the State structure. However, the fact that the position they held at one time was that of Head of State, Head of Government or Minister for Foreign Affairs does not in any way change the substantive regime of immunity *ratione materiae*, as appears to be confirmed by both treaty and judicial practice. The latter does not offer any examples of cases in which a former Head of State, Head of Government or Minister for Foreign Affairs has benefited from a more advantageous regime than the one corresponding to any other official by application of immunity *ratione materiae*. This same conclusion may be drawn from the resolutions on immunity of the International Law Institute, in particular those adopted in 2001 and 2009.

D. Scope of immunity *ratione materiae*

132. The two normative elements of immunity *ratione materiae* analysed in the preceding pages are conceptually and legally distinct, which justifies their separate consideration in this report. However, the two elements are interrelated and help to define the scope (material and substantive) of immunity *ratione materiae*. In addition, the Commission, when provisionally adopting draft article 4 (Scope of immunity *ratione personae*), chose to cover the two elements in a single draft article. Accordingly, based on the analysis conducted in this report on the material and temporal elements of immunity *ratione materiae*, the following draft article is proposed:

Draft article 6
Scope of immunity *ratione materiae*

1. State officials, when acting in that capacity, enjoy immunity *ratione materiae*, both while they are in office and after their term of office has ended.

2. Such immunity *ratione materiae* covers exclusively acts performed in an official capacity by State officials during their term of office.

3. Immunity *ratione materiae* applies to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, under the conditions set out in paragraphs 1 and 2 of this draft article.

133. Draft article 6 follows the same pattern as the draft article on the scope of immunity *ratione personae* (draft article 4), adopted by the Commission in 2014. The proposed draft article should be read together with the other draft articles provisionally adopted by the Commission, and the commentary thereto; in particular, it should be read in conjunction with draft article 5. Lastly, it should be noted that draft article 6 has no implications and should not be read as a pronouncement on the issue of limits and exceptions to immunity.

III. Future workplan

134. In her fifth report, to be submitted to the Commission in 2016, the Special Rapporteur proposes to analyse the issue of limits and exceptions to the immunity of State officials from foreign criminal jurisdiction.

135. The issue of limits and exceptions to immunity has been present in the work of the International Law Commission ever since it began to study the topic of immunity of State officials from foreign criminal jurisdiction; it was addressed in the memorandum by the Secretariat[223] and in the second report of the former Special Rapporteur, Mr. Kolodkin.[224] It is certainly one of the major issues to which the Commission should respond, and it can unequivocally be said that it is the most politically sensitive issue among those addressed by these draft articles. It therefore comes as no surprise that the issue of limits and exceptions has been the subject of an ongoing debate in the Commission and that in fact some of its members consider the issue to be the very purpose, even the only purpose, of this topic. The importance attributed to this issue is also reflected in the statements delivered in the Sixth Committee of the General Assembly, in which States have repeatedly insisted that the topic of immunity of State officials from foreign criminal jurisdiction must be addressed in a way that is not detrimental to or incompatible with the ongoing efforts of the international community to combat impunity. That said, in the opinion of another group of States, the issue of limits and exceptions to immunity should be approached cautiously and prudently.

136. As was noted in the preliminary report of the Special Rapporteur,[225] the issue of limits and exceptions to immunity should be addressed once the analysis of the normative elements of immunity *ratione personae* and immunity *ratione materiae* has been completed. This is for the obvious reason that only after examining the basic elements that define the general regime applicable in abstract terms to immunity from foreign criminal jurisdiction is it possible to address the complex question of whether that general regime may be subject to limits and exceptions. In addition, the issue of limits and exceptions to immunity must be analysed both comprehensively and with reference to the two types of immunity previously analysed.

[223] See A/CN.4/596.
[224] See A/CN.4/631.
[225] See A/CN.4/654.

137. The issue of limits and exceptions to immunity has been considered essentially from the perspective of the acts that can be covered by immunity. Emphasis has therefore been placed on the relationship between immunity from foreign criminal jurisdiction, international crimes, grave and systematic human rights violations, the fight against impunity and *jus cogens*. The wealth of legal literature produced in recent years on the immunity of the State and its officials underscores how the aforementioned relationship constitutes one of the major concerns of the legal community. However, this concern is not exclusively theoretical or doctrinal. On the contrary, the discussion concerning the judgements of the European Court of Human Rights in the *Al-Adsani* and *Jones* cases demonstrates how the issue of limits and exceptions to sovereign immunity has a very important practical dimension. Lastly, the judgment of the International Court of Justice on the *Jurisdictional Immunities of the State* case has placed the close relationship between immunity and several key categories of contemporary international law at the forefront of the debate, while the recent judgement of the Italian Constitutional Court concerning the application in Italy of that International Court of Justice judgment has added complexity to the issue. Consequently, any work of the Commission on the immunity of State officials from foreign criminal jurisdiction would be incomplete without an appropriate consideration of the limits and exceptions to such immunity.

138. Such analysis should not be limited to the relationship between international crimes and immunity from foreign criminal jurisdiction, even though that issue certainly constitutes the central and most controversial aspect of the issue. Instead, the distinction between a limit and an exception, and the different functions that each of these categories may play in the legal regime of immunity of State officials from foreign criminal jurisdiction, must first be examined. Such analysis must also be carried out systematically, taking due account of the fact that international law is a complete legal system whose rules are related and interact with each other.

139. With the submission and discussion of the report on limits and exceptions to immunity, the Commission could, during the present quinquennium, complete its study of the substantive issues which define the legal status of the institution. Issues of a procedural nature should be addressed in a sixth report, which would be submitted to the Commission during the first session of the next quinquennium. The submission of the proposed report and future work will, however, be subject to any decisions taken by the new Commission that is to be elected by the General Assembly in 2016.

Annex I. Proposed draft articles

Draft article 2
Definitions

For the purposes of the present draft articles:

(f) An "act performed in an official capacity" means an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction.

Draft article 6
Scope of immunity *ratione materiae*

1. State officials, when acting in that capacity, enjoy immunity *ratione materiae*, both while they are in office and after their term of office has ended.

2. Such immunity *ratione materiae* covers exclusively acts performed in an official capacity by State officials during their term of office.

3. Immunity *ratione materiae* applies to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, under the conditions set out in paragraphs 1 and 2 of this draft article.